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# LAW OF REAL PROPERTY

INCLUDING, ALSO,

139 GENERAL RULES OF LAW RELATIVE TO THE  
PURCHASE AND SALE OF LAND, OR LAW  
OF VENDOR AND PURCHASER, TO  
WHICH IS ADDED A VOLUME

EMBRACING THE

RIGHTS, DUTIES, AND REMEDIES

OF

LANDOWNERS.

NEW PRACTITIONERS' SERIES.

IN THREE VOLUMES.

VOL. II.

SECOND EDITION, REVISED, ENLARGED, AND EXTENDED

By CHARLES T. BOONE.

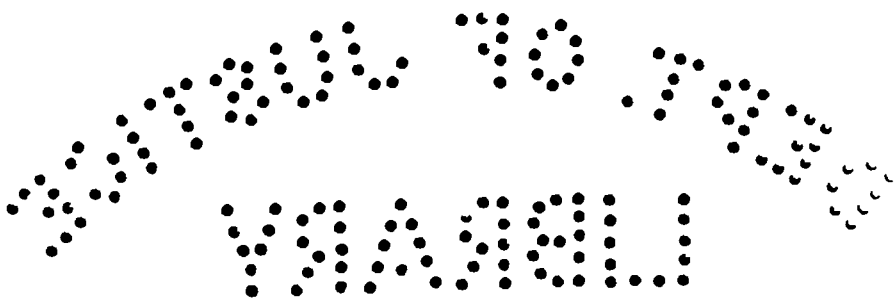
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## CHAPTER XXIII.

### TITLE.

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### § 246. Definition.

A title is defined to be the means whereby the

owner of the lands or other real property has the just and legal possession and enjoyment of it.<sup>1</sup> This definition has respect not only to the instruments of conveyance, as deeds, wills, and other muniments of ownership, but also to those acts of possession and occupation which usually attend the title.<sup>2</sup> Several stages or degrees are said to be requisite to a complete title to lands and tenements, namely, the mere naked possession, or actual occupation of the estate, the right of possession, and the right of property.<sup>3</sup> The union of these three constitute a complete title.<sup>4</sup> Actual possession alone is *prima facie* evidence of a legal title,<sup>5</sup> and without actual possession no title is complete or perfect.<sup>6</sup> The right of possession may exist in one person, while the actual possession is in another.<sup>7</sup> There is an apparent right of possession, which may be rebutted by a better right,<sup>8</sup> and an actual right of possession, which will stand the test against all opposing claims.<sup>9</sup> The mere right of property, without either possession, or even the right of possession, is frequently designated as the mere right, *jus merum*;<sup>10</sup> the estate of the owner is in such case said to be divested, and turned to a right.<sup>11</sup>

1 Coke on Littleton, 345b; 2 Greenleaf's Cruise on Real Property, 127; 2 Blackstone's Commentaries, 195; Arrington v. Liscom, 34 Cal. 365, 94 Am. Dec. 722. See Burton on Real Property, sec. 418. Title means the same thing as ownership: Walker's American Law, 317.

2 See Willard on Real Estate, 312, 313.

3 2 Blackstone's Commentaries, 195 et seq.; and see *Donovan v. Pitcher*, 53 Ala. 411, 25 Am. Rep. 634.

4 2 Blackstone's Commentaries, 199; Coke on Littleton, 266; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429, 19 Am. Dec. 139.

5 2 Blackstone's Commentaries, 196; 2 Greenleaf's Cruise on Real Property, 127, 128; and see *Colvin v. Warford*, 20 Md. 395; *Hyatt v. Wood*, 4 Johns. 157, 4 Am. Dec. 258; *Campbell v. Arnold*, 1 Johns. 511; *Tuttle v. Jackson*, 6 Wend. 213, 21 Am. Dec. 306; *Herbert v. Herbert*, Breese, 354, 12 Am. Dec. 192.

6 2 Blackstone's Commentaries, 196. See *Morrison v. Kelly*, 22 Ill. 610, 74 Am. Dec. 169; *Hughes v. Graves*, 39 Vt. 359, 94 Am. Dec. 331; *Ricard v. Williams*, 7 Wheat. 105.

7 2 Greenleaf's Cruise on Real Property, 129; 2 Blackstone's Commentaries, 196.

8 2 Blackstone's Commentaries. 196.

9 2 Blackstone's Commentaries, 196; 2 Greenleaf's Cruise on Real Property, 130; Coke on Littleton, sec. 385; *Smith v. Tyndal*, 2 Salk. 685.

10 Coke on Littleton, 345; 2 Blackstone's Commentaries, 197.

11 2 Blackstone's Commentaries, 197; 2 Greenleaf's Cruise on Real Property, 130, 131.

## § 247. How Acquired in General.

The modes of acquiring title to real property are reduced to two only, regarded as classes, namely, descent and purchase.<sup>1</sup> Title by descent is where the title is vested in a person by the single operation of law;<sup>2</sup> and title by purchase is where the title is vested by the person's own act or agreement.<sup>3</sup> The latter includes every mode of acquisition known to the law,<sup>4</sup> except that by which a person, upon the death of his ancestor, acquires his estate by right of representation,



as his heir at law.<sup>5</sup> Title by devise is a title by purchase.<sup>6</sup>

1 See Coke on Littleton, 18; 2 Blackstone's Commentaries, 201; 2 Greenleaf's Cruise on Real Property, 133; 4 Kent's Commentaries, 373; 2 Washburn on Real Property, 401; Pemberton v. Hicks, 1 Binn. 1.

2 Coke on Littleton, 18; Donahue's Estate, 36 Cal. 329; Womack v. Womack, 2 La. Ann. 339.

3 Coke on Littleton, 18; 2 Blackstone's Commentaries, 201.

4 2 Blackstone's Commentaries, 241; and see Donahue's Estate, 36 Cal. 329.

5 2 Blackstone's Commentaries, 201; James v. Morey, 2 Cow. 246, 14 Am. Dec. 475; McCartee v. Orphan Asylum, 9 Cow. 437, 18 Am. Dec. 516.

6 Stamm v. Bostwick, 122 N. Y. 48.

### § 248. By Prescription.

Title to real property by prescription is founded on the presumption that he who has had a quiet and uninterrupted possession of a thing for a long period of years is supposed to have a just right, without which he could not have been suffered to continue in the enjoyment of it.<sup>1</sup> This kind of title, like custom, is founded on long usage;<sup>2</sup> but it differs from custom, as constituting not the law of a certain locality, but the right of an individual.<sup>3</sup> Custom is local and prescription personal in its nature.<sup>4</sup> Technically speaking, prescription applies only to incorporeal hereditaments—such as rents, rights of way, and the like—and not to land or corporeal property.<sup>5</sup> Title to land requires the higher evidence of corporeal seisin and inheritance.<sup>6</sup> But in this country, prescrip-

tion has generally been put upon the ground of the presumption of a previous grant or agreement, which has been lost by lapse of time;<sup>7</sup> and the presumption applies as well to a grant of lands as to incorporeal hereditaments.<sup>8</sup> A grant of land may as well be presumed as a grant of a fishery, or of a common or of a way.<sup>9</sup>

1 2 Greenleaf's Cruise on Real Property, 221; and see Ricard v. Williams, 7 Wheat. 109; Coolidge v. Learned, 8 Pick. 503. Title by prescription cannot be acquired by possession unaccompanied by any claim of ownership: Wafer v. Pratt, 1 Rob. (La.) 41, 36 Am. Dec. 681.

2 Coolidge v. Learned, 8 Pick. 503; Perley v. Langley, 7 N. H. 233.

3 Perley v. Langley, 7 N. H. 233; Wallace v. Morgan, 23 Ind. 399; Tyson v. Smith, 9 Ad. & E. 401; Bland v. Lipscombe, 30 Eng. L. & Eq. 189.

4 Cortelyou v. Van Brundt, 2 Johns. 362, 3 Am. Dec. 439.

5 Cortelyou v. Van Brundt, 2 Johns. 362; Ferris v. Brown, 3 Barb. 105; Hall v. McLeod, 2 Met. (Ky.) 98, 74 Am. Dec. 400.

6 Cortelyou v. Van Brundt, 2 Johns. 362, 3 Am. Dec. 439.

7 Coolidge v. Learned, 8 Pick. 503; Valentine v. Piper, 22 Pick. 85, 33 Am. Dec. 715; Powell v. Bogg, 8 Gray, 443, 69 Am. Dec. 262; Charles River Bridge Co. v. Warren Bridge Co., 7 Pick. 449; Edson v. Munsell, 10 Allen, 568; Den v. Mulford, 21 N. J. L. 500; Burbank v. Fay, 5 Lans. 397; Casey v. Inloes, 1 Gill, 430; Roods v. Symmes, 1 Ohio, 216; Chew v. Morton, 10 Watts, 321; Commonwealth v. Coupe, 128 Mass. 63; and see Webb v. Bird, 13 Com. B., N. S., 841.

8 Deery v. Cray, 5 Wall. 795; Melvin v. Proprietors etc., 16 Pick. 137.

9 Ricard v. Williams, 7 Wheat. 109.

**§ 249. Time of Prescription.**

By the English law, the term of possession or use requisite to raise a right by prescription was for a time beyond the memory of man;<sup>1</sup> and the beginning of the reign of Richard I was fixed as the limit of legal memory.<sup>2</sup> This period was reduced by statute of 32 Henry VIII to sixty years.<sup>3</sup> But for some reason this statute was construed with great strictness by the English courts, and the time of prescription for incorporeal rights remained as before.<sup>4</sup> The inconvenience was, however, obviated in practice, by allowing the jury to presume a grant after a long period of enjoyment,<sup>5</sup> and the period was fixed at twenty years, by analogy from the limitation prescribed by statute (21 James I, c. 21), for actions of ejectment.<sup>6</sup> The presumption is not founded on a belief that a grant has actually been made in the particular case, but on the general presumption that a man will naturally enjoy what belongs to him, the difficulty of proof after lapse of time, and the policy of not disturbing long-continued possessions.<sup>7</sup> The period of prescription varies in the different states, according to the period fixed by law as the limitation of all real actions;<sup>8</sup> but in many of the states the requisite time is twenty years.<sup>9</sup> Where, under the statute of limitations, title to property has vested, it is as good a title as if conferred by grant or will;<sup>10</sup> and retroactive legislation cannot destroy that title.<sup>11</sup>

1 Coke on Littleton, 115a; 2 Greenleaf's Cruise on Real Property, 226; Pringe v. Child, 2 Rolle Abr. 269.

2 2 Greenleaf's Cruise on Real Property, 226; Lehigh Valley R. R. Co. v. McFarlan, 43 N. J. L. 617, 618; and see Edson v. Munsell, 10 Allen, 561. The matter is now regulated by statute of 2 and 3 William IV, chapter 71; and see Glover v. Coleman, L. R. 10 Com. P. 108; 11 Eng. Rep. 275.

3 Edson v. Munsell, 10 Allen, 561, 562.

4 Edson v. Munsell, 10 Allen, 562; Coolidge v. Learned, 8 Pick. 503, 508.

5 Jenkins v. Harvey, 1 Crompt. M. & R. 877; Watkins v. Peck, 13 N. H. 360; Bolivar Mfg. Co. v. Neponset Mfg. Co., 16 Pick. 247.

6 See sec. 137, ante; Currier v. Gale, 3 Allen, 330; Brubaker v. Paul, 7 Dana, 428, 32 Am. Dec. 111.

7 Hillary v. Waller, 12 Ves. 239; Coolidge v. Learned, 8 Pick. 508; Melvin v. Waddell, 75 N. C. 361; Ricard v. Williams, 7 Wheat. 109; and see Tyler v. Wilkinson, 4 Mason, 402; Strickler v. Todd, 10 Serg. & R. 63, 13 Am. Dec. 649.

8 See Arbuckle v. Ward, 29 Vt. 43; Salle v. Primm, 3 Mo. 529; Fox v. Blossom, 17 Blatchf. 352; Okeson v. Patterson, 29 Pa. St. 22; Washabaugh v. Entriiken, 34 Pa. St. 74; Mead v. Leffingwell, 83 Pa. St. 187; Norris v. Moody, 84 Cal. 143; Detweiler v. Schultheis, 122 Ind. 155; Buford v. Kerr, 86 Fed. Rep. 97; sec. 137, ante.

9 Edson v. Munsell, 10 Allen, 566; Miller v. Garlock, 8 Barb. 153; Stein v. Burden, 24 Ala. 130; Lehigh Valley R. R. Co. v. McFarlan, 43 N. J. L. 605; Webbs v. Hynes, 9 B. Mon. 388; Trask v. Ford, 39 Me. 437. But a grant cannot be presumed against a person legally incapable of making it: Barker v. Richardson, 4 Barn. & Ald. 579; and see Watkins v. Peck, 13 N. H. 377; Edson v. Munsell, 10 Allen, 557.

10 Industrial Co. v. Shultz, 43 W. Va. 470.

11 Hull v. Webb, 21 W. Va. 318; McEldowney v. Wyatt, 44 W. Va. 713.

## § 250. Requisites of Prescription.

The possession or use on which a prescriptive

title is founded must not only be for the proper length of time,<sup>1</sup> but it must also be open, peaceable, continued, and unequivocal.<sup>2</sup> So it must be adverse or of a nature to indicate that it is claimed as a right, and is not the effect of indulgence, or of any compact short of a grant.<sup>3</sup> And it should be with the acquiescence of the true owner;<sup>4</sup> and any fact which directly affects the probability of such acquiescence must be submitted to the jury, to assist them in determining whether the presumption of a grant should or should not be made.<sup>5</sup> But mere inattention on the part of the owner of land to the fact that an easement in it is used by another does not weaken the force of the presumption arising from lapse of time.<sup>6</sup> A claim of title without possession can never give title by prescription.<sup>7</sup>

1 Sec. 248, ante.

2 *Salle v. Primm*, 3 Mo. 529; *Rhodes v. Whitehead*, 27 Tex. 304, 84 Am. Dec. 631; *Lawton v. Rivers*, 2 McCord, 445, 13 Am. Dec. 741; *Ward v. Warren*, 82 N. Y. 265; *Jackson v. Burton*, 1 Wend. 341; *Connor v. Sullivan*, 40 Conn. 26, 16 Am. Rep. 10; *Smeberg v. Cunningham*, 96 Mich. 378, 35 Am. St. Rep. 613; *Bailey v. Appleyard*, 8 Ad. & E. 161. See sec. 252, post.

3 *Grube v. Wells*, 34 Iowa, 148; *Musick v. Barney*, 49 Mo. 458; *Gayetty v. Bethune*, 14 Mass. 53, 7 Am. Dec. 188; *Branch v. Doane*, 17 Conn. 402; *Chalfin v. Malone*, 9 B. Mon. 496; *Willamette Real Estate Co. v. Hendrix*, 28 Or. 485, 52 Am. St. Rep. 800; *Garrett v. Jackson*, 20 Pa. St. 331. See sec. 252, post.

4 *Powell v. Bagg*, 8 Gray, 443; *Edson v. Munsell*, 10 Allen, 567; *Pierre v. Fernald*, 26 Me. 440. But compare *Ward v. Warren*, 82 N. Y. 265; *Key v. Jennings*, 66 Mo. 365.

5 Daniel v. North, 11 East, 374; Stevens v. Taft, 11 Gray, 33; Edson v. Munsell, 10 Allen, 568; Ricard v. Williams, 7 Wheat. 109, 110; and see Thompson v. Pioche, 44 Cal. 508; Woods v. Transportation Co., 84 Ala. 560, 5 Am. St. Rep. 393; Peterson v. McCullough, 50 Ind. 35.

6 Reimer v. Stuber, 20 Pa. St. 458, 59 Am. Dec. 744; and see Key v. Jennings, 66 Mo. 365.

7 Johnson v. Conant, 64 N. H. 109; Linen v. Maxwell (Sup. Ct., N. H.), 40 Atl. Rep. 184.

### § 251. Prescription, How Lost.

A prescription is lost by the destruction of the subject matter of it;<sup>1</sup> but not by an alteration in the quality of the thing to which the prescription is annexed.<sup>2</sup> A prescription may also be lost by neglecting to claim or exercise it;<sup>3</sup> and it may be lost by unity of possession of as high and perdurable an estate in the thing claimed, and in the land out of which it is claimed.<sup>4</sup>

1 2 Greenleaf's Cruise on Real Property, 232.

2 Cowper v. Andrews, Hob. 39; Luttrell's Case, 4 Rep. 86. Compare Renshaw v. Bean, 10 Eng. L. & Eq. 417; Saunders v. Newman, 1 Barn. & Ald. 253; Stein v. Bruden, 24 Ala. 130, 60 Am. Dec. 453; Blanchard v. Baker, 8 Me. 253.

3 See Simpson v. Gutteridge, 1 Madd. 609; Carr v. Foster, 3 Ad. & E., N. S., 581; Wright v. Freeman, 5 Har. & J. 467; Casler v. Shipman, 35 N. Y. 533; sec. 147, ante.

4 2 Greenleaf's Cruise on Real Property, 231; Canhan v. Fisk, 2 Crompt. & J. 126. Compare Manning v. Smith, 6 Conn. 289; Hazard v. Robinson, 3 Mason, 272; Coleman's Appeal, 62 Pa. St. 274; Plympton v. Converse, 42 Vt. 712.

**§ 252. Adverse Possession.**

The adverse character of the possession which is requisite to establish title by prescription must be proved to the satisfaction of the jury, like any other fact.<sup>1</sup> The law presumes that where title is shown, the true owner is in possession until adverse possession is proved to begin;<sup>2</sup> and it does not begin until an actual entry is made, accompanied by a claim of title hostile to that of the true owner.<sup>3</sup> In order to make it a bar, strict proof is necessary that it was hostile in its inception, and had continued so for the requisite period.<sup>4</sup> It must be exclusive, continuous, uninterrupted, open and notorious, and with the knowledge and acquiescence of the owner,<sup>5</sup> and while such owner is able in law to assert and enforce his rights and to resist such adverse claim if not well founded.<sup>6</sup> If the continuity be broken, either by fraud or a wrongful entry, the protection given by the statute of limitations is lost;<sup>7</sup> though if there be several adverse occupants, the last one may tack the possession of his predecessor to his, so as to make a continuous adverse possession for the period required by the statute, provided there is a privity of possession between such occupants.<sup>8</sup> If the adverse possession begins to run in the lifetime of the ancestor, it continues to run, though the land descends to a person under a disability.<sup>9</sup> A tenant cannot set up his possession as adverse to his landlord, while the

relation of landlord and tenant continues.<sup>10</sup> And no disseisin of the tenant of a particular estate and occupation under it, however long continued, will affect the right of the reversioner.<sup>11</sup> At common law, no prescription could be maintained against the king;<sup>12</sup> but the lapse of sixty years is by statute a bar to any claim of the crown.<sup>13</sup> In New York adverse possession to bar the people must be continued forty years;<sup>14</sup> but the grantee of the people is barred in twenty years from his grant.<sup>15</sup> Mere possession of government land, though open, exclusive, and uninterrupted for twenty years, creates no impediment to its recovery by the government or by one who within that period receives a conveyance from the government.<sup>16</sup> Twenty years' user under a license does not give a prescriptive right, since the possession is by consent, and not adverse.<sup>17</sup> In general, adverse possession of the character above described under claim of title in fee, vests the title in the claimant so holding possession as effectually as though such title had been acquired by deed.<sup>18</sup> Such possessory title is held to be good and marketable,<sup>19</sup> although there may be serious defects in the paper title.<sup>20</sup>

1 *Jackson v. Parker*, 3 Johns. Ch. 124; *Jackson v. Sharp*, 9 Johns. 163, 6 Am. Dec. 627; *Clap v. Bromagham*, 9 Cow. 530; *Grube v. Wells*, 34 Iowa, 148; *Musick v. Barney*, 49 Mo. 458; *Russell v. Davis*, 38 Conn. 562; *Fitchburg Railroad v. Page*, 131 Mass. 391; *Woods v. Transportation Co.*, 84 Ala. 560, 5 Am. St. Rep. 393; *Lampman v. Van Alstyne*, 94 Wis. 417.



2 Jackson v. Sharp, 9 Johns. 163, 6 Am. Dec. 627; Miner v. Mayor etc., 5 Jones & S. 171; Carson v. Burnet, 1 Dev. & B. 546, 30 Am. Dec. 143.

3 Jackson v. Parker, 3 Johns. Ch. 124; Miner v. Mayor etc., 5 Jones & S. 171; Thomas v. Babb, 45 Mo. 384; Smeberg v. Cunningham, 96 Mich. 378, 35 Am. St. Rep. 613; Jarvis v. Grafton, 44 W. Va. 453.

4 Jackson v. Waters, 12 Johns. 365; Rung v. Shonberger, 2 Watts, 66, 26 Am. Dec. 95; Gay v. Moffit, 2 Bibb, 507; Schwallback v. Railway Co., 69 Wis. 292, 2 Am. St. Rep. 740; Huntington v. Whaley, 29 Conn. 391. Compare Jackson v. Birner, 48 Ill. 203.

5 Gillespie v. Jones, 26 Tex. 343; Winslow v. Winslow, 52 Ind. 8; Arrington v. Liscom, 34 Cal. 365; Thompson v. Pioche, 44 Cal. 508; Union Canal Co. v. Young, 1 Whart. 410, 30 Am. Dec. 212; Wilson v. Henry, 40 Wis. 594; Gulf R. R. Co. v. Owen, 8 Kan. 409; Downing v. Mayes, 153 Ill. 330, 46 Am. St. Rep. 896; Normant v. Eureka Co., 98 Ala. 181, 39 Am. St. Rep. 45; Smith v. Hitchcock, 38 Neb. 104; Fink v. Dawson, 52 Neb. 647; Unger v. Mooney, 63 Cal. 595, 49 Am. Rep. 100; Colvin v. Land Assn., 23 Neb. 75, 8 Am. St. Rep. 114; Evans v. Templeton, 69 Tex. 375, 5 Am. St. Rep. 71; Harn v. Smith, 79 Tex. 310, 23 Am. St. Rep. 340; Myers v. McGavick, 39 Neb. 843, 42 Am. St. Rep. 627; Meacham v. Bunting, 156 Ill. 586, 47 Am. St. Rep. 239; Watrous v. Morrison, 33 Fla. 261, 39 Am. St. Rep. 139; Beasley v. Howell, 117 Ala. 499; sec. 248, ante.

6 Thompson v. Pioche, 44 Cal. 508; Dodge v. McClintock, 47 N. H. 387; Crispen v. Hannavan, 50 Mo. 536; Edson v. Munsell, 10 Allen, 567; Tickle v. Brown, 4 Ad. & E. 369.

7 San Francisco v. Fulde, 37 Cal. 340; San Jose v. Trimble, 41 Cal. 543; Townsend v. Edwards, 25 Fla. 588; Elyton Land Co. v. Denny, 108 Ala. 553; Olewine v. Messmore, 128 Pa. St. 470; and see Livingston v. Peru Iron Co., 9 Wend. 511; Pederick v. Searle, 5 Serg. & R. 240. It is a question for the jury to determine whether, in fact, the adverse possession has been continuous, or has been interrupted: Bowen v. Guild, 130 Mass. 121; O'Hara v. Richardson, 46 Pa. St. 385; and see Colgan v. Pellens, 48 N. J. L. 27.

8 *Shuffleton v. Nelson*, 2 Saw. 540; and see *Schrack v. Zubler*, 34 Pa. St. 38; *Kruse v. Wilson*, 79 Ill. 233; *Christy v. Alford*, 17 How. 601; *Innis v. Miller*, 10 Mart. 289, 13 Am. Dec. 330; *Haynes v. Boardman*, 119 Mass. 414; *Coogler v. Rogers*, 25 Fla. 882; *Alexander v. Stewart*, 50 Vt. 87.

9 *Jackson v. Moore*, 13 Johns. 513; *Fleming v. Griswold*, 3 Hill, 85; *Beeker v. Van Valkenburgh*, 29 Barb. 319; *Currier v. Yale*, 3 Allen, 328. But see *Everett v. Whitfield*, 27 Ga. 159; *Wilson v. Kilcannon*, 4 Hayw. (Tenn.) 182.

10 *Campbell v. Shipley*, 41 Md. 81; *Jackson v. Davis*, 5 Cow. 123; *Alexander v. Gibbon*, 118 N. C. 796, 54 Am. St. Rep. 757. Compare *Jackson v. Harsen*, 7 Cow. 323, 17 Am. Dec. 517; *People v. Trinity Church*, 22 N. Y. 44. See sec. 104, ante.

11 *Miller v. Ewing*, 6 Cush. 34; *Jackson v. Schoonmaker*, 4 Johns. 390; *Salmon v. Davis*, 29 Mo. 176; *Meacham v. Bunting*, 156 Ill. 586, 47 Am. St. Rep. 239; *Lumley v. Haggerty*, 110 Mich. 552, 64 Am. St. Rep. 364; *Schroeder v. Tomlinson*, 70 Conn. 348; *Gallagher v. Johnson*, 65 Ark. 90; and see *Bedell v. Shaw*, 59 N. Y. 50.

12 2 *Greenleaf's Cruise on Real Property*, 264; and see *Kennedy v. Townsley*, 16 Ala. 239; *Levasser v. Washburn*, 11 Gratt. 572; *Vickery v. Benson*, 26 Ga. 590; *Burgess v. Gray*, 16 How. 65.

13 Stat. 21 James I, c. 2; Stat. 9 George III, c. 16. Adverse possession does not give title as against sovereign power: *Gardiner v. Miller*, 47 Cal. 570.

14 *La Frambois v. Jackson*, 8 Cow. 589, 18 Am. Dec. 463; and see *People v. Arnold*, 4 N. Y. 508; *People v. Clarke*, 10 Barb. 120.

15 *La Frambois v. Jackson*, 8 Cow. 589, 18 Am. Dec. 463.

16 *Oaksmith v. Johnston*, 92 U. S. 343; *Wiggins v. Kirby*, 106 Ala. 262; *Stringfellow v. Railroad Co.*, 117 Ala. 250; *Dooley v. Maywald* (Tex. Civ. App.), 45 N. W. Rep. 221; *Drew v. Valentine*, 18 Fed. Rep. 712; *Harrison v. Ulrichs*, 39 Fed. Rep. 654. See *Spelman v. Curtenius*, 12 Ill. 409; *Walls v. McGee*, 4 Harr. (Del.) 108; *Swearingen v. United States*, 11 Gill & J. 373; *Com-*

monwealth v. Hutchinson, 10 Pa. St. 466; Church v. Meeker, 34 Conn. 421.

17 Wiseman v. Lucksinger, 84 N. Y. 31, 38 Am. Rep. 479; Babcock v. Utter, 1 Abb. Ct. App. 27.

18 Arrington v. Liscom, 34 Cal. 365; School Dist. v. Benson, 31 Me. 385; Wall v. Shindler, 47 Mo. 282; McEldowney v. Wyatt, 44 W. Va. 713; Greene v. Couse, 127 N. Y. 386, 24 Am. St. Rep. 458; Parker v. Metzger, 12 Or. 407. Compare Tyler v. Wilkinson, 4 Mason, 402; Ford v. Wilson, 35 Miss. 504; Sargent v. Ballard, 9 Pick. 255; Crook v. Glen, 30 Md. 55; Sherman v. Kane, 14 Jones & S. 310; Holmes v. Gay, 6 Bush, 47.

19 Foreman v. Wolf (Md. Ct. App.), 29 Atl. Rep. 837; Tewksbury v. Howard, 138 Ind. 110; O'Connor v. Huggins, 113 N. Y. 521; Barnard v. Brown, 112 Mich. 452, 67 Am. St. Rep. 432; Bickwell v. Comstock, 113 U. S. 149.

20 Lurman v. Hubner, 75 Md. 268; Erdman v. Corse, 87 Md. 506.

### § 252a. Same—Continued.

The elements of title by adverse possession are thus enumerated: 1. Such possession as the land reasonably admits of; 2. Openness and notoriety and exclusiveness of possession; 3. Hostility toward everybody else in respect of the possession; 4. Holding the possession under claim of right or claim or color of title; and 5. Continuity for the statutory period.<sup>1</sup> Evidence of adverse possession must be clear and positive, and should be strictly construed, and every reasonable presumption made in favor of the true owner.<sup>2</sup> The law presumes the possession to be in the owner, where there is no adverse possession.<sup>3</sup> And the burden of proving all the essential elements of an adverse possession is upon the party relying

upon it.<sup>4</sup> Acts of possession, in order to constitute adverse possession, must be such as, if seen by the party whose claim is sought to be divested, would clearly apprise him that the party doing the acts claimed the ownership of the property.<sup>5</sup> But it is not necessary that the acts should be such that the true owner will know of the hostile claim, if they are such as to furnish him the means of knowledge.<sup>6</sup> The word "notorious," as used in defining an adverse holding, means that the possession or character of the holding possesses such elements of notoriety that the owner may be presumed to have notice of it and of its extent.<sup>7</sup> A claim of right or ownership, as a basis for a claim of adverse possession, may rest upon the fact shown by parol that the party has purchased the land,<sup>8</sup> while a claim or color of title, for a like purpose, may be shown by any paper purporting to convey the land or the right to its possession, however lacking in the essentials of a muniment of title, provided always the party claims under it in good faith.<sup>9</sup> And it is held that one acquiring color of title is presumed to have acted in good faith, which presumption must be overcome, in order to establish bad faith, by evidence showing a design to defraud the party having the better title.<sup>10</sup> Adverse possession by a nonresident, maintained by his agent or tenant, will, if sufficiently long continued, create title by prescription.<sup>11</sup> One tenant in common can-

not make his possession adverse to his cotenant except by actual ouster, or by setting up a claim, in his own right, to the whole tract of land in question and holding adverse possession thereof for the statutory period.<sup>12</sup> But it is held that one who purchases an undivided interest in lands, and enters as a stranger to the rights of his cotenants, is not estopped from setting up as against them an adverse title that originated before his purchase.<sup>13</sup> Possession held under a lease or license is not adverse, and can be of no avail as a defense under the statute of limitations.<sup>14</sup>

1 Goodson v. Brothers, 111 Ala. 589, 595; and see, also, Lampman v. Van Alstyne, 94 Wis. 417; Bolden v. Sherman, 101 Ill. 483; Lewon v. Heath, 53 Neb. 707; Mabary v. Dollarhide, 98 Mo. 198, 14 Am. St. Rep. 639, and cases cited in preceding section.

2 Ayers v. Reidel, 84 Wis. 276; Roberts v. Richards, 84 Me. 1; Lampman v. Van Alstyne, 94 Wis. 417; Preble v. Railroad Co., 85 Me. 260, 35 Am. St. Rep. 366; Heller v. Cohen, 154 N. Y. 299, 311.

3 Alexander v. Gibbon, 118 N. C. 796, 54 Am. St. Rep. 757. See sec. 20, ante.

4 De Frieze v. Quint, 94 Cal. 653, 28 Am. St. Rep. 151. See Abbett v. Page, 92 Ala. 571; Elyton Land Co. v. McElrath, 53 Fed. Rep. 763; Atkinson v. Smith (Va. Sup. Ct. App.), 24 S. E. Rep. 901.

5 Chabert v. Russell, 109 Mich. 571; and see Goodson v. Brothers, 111 Ala. 589; Woods v. Transportation Co., 84 Ala. 560, 5 Am. St. Rep. 393; Goodwin v. McCabe, 75 Cal. 584; Beecher v. Galvin, 71 Mich. 391; Wilson v. McEwan, 7 Or. 87.

6 Lampman v. Van Alstyne, 94 Wis. 417; Nigger v. Mooney, 63 Cal. 586, 49 Am. Rep. 100; De Frieze v. Quint, 94 Cal. 653, 28 Am. St. Rep. 151; Foulke v. Bond, 41 N. J. L. 527.

7 Watrous v. Morrison, 33 Fla. 261, 39 Am. St. Rep. 139; Normant v. Eureka Co., 98 Ala. 181, 39 Am. St. Rep. 45; and see Downing v. Mayes, 153 Ill. 330, 46 Am. St. Rep. 896.

8 Goodson v. Brothers, 111 Ala. 589; Ward v. Edge, 100 Ky. 757.

9 Goodson v. Brothers, 111 Ala. 589; and see further, as to color of title, Stewart v. Stewart, 90 Wis. 516, 48 Am. St. Rep. 949; Green v. Hugo, 81 Tex. 452, 26 Am. St. Rep. 824; Pharis v. Jones, 122 Mo. 125; Ross v. Payson, 160 Ill. 349; Bell v. Neiderer, 169 Ill. 54; Arnold v. Woodward, 14 Colo. 164; Dame v. Chandler, 80 Ga. 43.

10 Sexson v. Barker, 172 Ill. 361; Stumpf v. Osterhage, 111 Ill. 82.

11 Lindermayer v. Gunst, 70 Miss. 693, 35 Am. St. Rep. 685; Omaha etc. Trust Co. v. Parker, 33 Neb. 775, 29 Am. St. Rep. 506; McLean v. Smith, 106 N. C. 172. Compare Huff v. Crawford, 88 Tex. 368, 53 Am. St. Rep. 763; Wilson v. Daggett, 88 Tex. 375, 53 Am. St. Rep. 766.

12 Page v. Branch, 97 N. C. 97, 2 Am. St. Rep. 281; and see Alexander v. Gibbon, 118 N. C. 796, 54 Am. St. Rep. 757; Oglesby v. Hollister, 76 Cal. 136, 9 Am. St. Rep. 177; Coogler v. Rogers, 25 Fla. 853.

13 Watkins v. Green, 101 Mich. 493.

14 Handlan v. McManus, 100 Mo. 124, 18 Am. St. Rep. 533.

### § 252b. Same—Continued.

As a general rule, sustained by the weight of authority, a husband cannot hold adversely to his wife, nor the wife hold adversely to the husband, premises of which they are in joint occupancy.<sup>1</sup> Possession of land by a husband as trustee, for the use and benefit of his wife, is not adverse to her, even after he has obtained a divorce.<sup>2</sup> Possession by a widow, so long as her dower remains

unassigned, is not adverse to the heirs,<sup>3</sup> nor to one who purchases under a sale made by the administrator of her deceased husband.<sup>4</sup> Possession of land acquired by a father under a conveyance made to his infant child, and delivered to him, can never be the foundation of, nor ripen into, a prescriptive title in his favor.<sup>5</sup> Neither a mortgagor nor his grantee pendente lite can assert an adverse possession against the complainant in a bill to foreclose the mortgage, until after the time for redemption from the foreclosure sale expires.<sup>6</sup> It is settled law in California, and in some other states, that a title cannot be acquired to public property by adverse possession. Thus, no one can acquire by adverse occupation as against the public the right to a street or square dedicated to public uses.<sup>7</sup> In California, tide lands patented by the state may be acquired by adverse possession as against the patentee.<sup>8</sup> It has been ruled in some of the state courts that adverse possession will begin to run against the entryman on public lands from the time he becomes entitled to a patent, and not from the date of the patent.<sup>9</sup> On the other hand, it has been held that adverse possession is computed from the date of the patent issued by the state or by the United States, and not from the date of entry.<sup>10</sup> A vendee of land, in possession under an executory contract does not hold adversely to the vendor, so long as the purchase money remains unpaid;<sup>11</sup>

but such possession of the vendee is adverse to a claim of dower in the land made by the vendor's widow, and the statute will run in his favor against such claim.<sup>12</sup> A grantor of land may, after his deed is delivered, take adverse possession of the property conveyed, and if his possession is allowed to continue during the period prescribed by the statute of limitations, obtain a title as against his grantee;<sup>13</sup> and a title subsequently acquired by him inures to his benefit, and not to the benefit of the grantee.<sup>14</sup>

1 See *Gafford v. Strauss*, 89 Ala. 283, 18 Am. St. Rep. 111, and note. Compare *Collins v. Lynch*, 157 Pa. St. 246, 37 Am. St. Rep. 723; *Potter v. Adams*, 125 Mo. 118, 46 Am. St. Rep. 478.

2 *Meacham v. Bunting*, 156 Ill. 586, 47 Am. St. Rep. 239; *Reynolds v. Sumner*, 126 Ill. 58, 9 Am. St. Rep. 523.

3 *Woodstock Iron Co. v. Fullenwider*, 87 Ala. 584, 13 Am. St. Rep. 73; *Lumley v. Haggerty*, 110 Mich. 552, 64 Am. St. Rep. 364.

4 *Sherwood v. Baker*, 105 Mo. 472, 24 Am. St. Rep. 399.

5 *Parker v. Salmans*, 101 Ga. 160, 65 Am. St. Rep. 291. But see *Scarboro v. Scarboro*, 122 N. C. 234, case of a conveyance of land by parents to children, and continued occupation by the parents.

6 *Norris v. Ile*, 152 Ill. 190, 43 Am. St. Rep. 233. See *Borden v. Clow*, 21 Nev. 275, 37 Am. St. Rep. 511.

7 *People v. Pope*, 53 Cal. 437; *Visalia v. Jacobs*, 65 Cal. 434, 52 Am. Rep. 303; *San Leandro v. Le Breton*, 72 Cal. 170; *Oakland v. Water Front Co.*, 118 Cal. 160; *Home etc. of Inebriates v. San Francisco*, 119 Cal. 534; *London etc. Bank v. Oakland*, 86 Fed. Rep. 30. So, to same effect, see *Webb v. Demopolis*, 95 Ala. 116; *Commonwealth v. Moorehead*, 118 Pa. St. 344, 4 Am. St. Rep. 599; *Driggs v. Phillips*, 103 N. Y. 77; *Yates v. Warrenton*, 84 Va. 337, 10 Am. St. Rep. 860; *Vicks-*



burg v. Marshall, 59 Miss. 563; Rae v. Miller, 99 Iowa, 650. Contra, Fort Smith v. McKibbin, 41 Ark. 45, 48 Am. Rep. 19; Cady v. Fitzsimmons, 50 Conn. 209; Flynn v. Detroit, 93 Mich. 590; Cornwall v. Railroad Co., 87 Ky. 72.

8 Allen v. McKay, 120 Cal. 332.

9 Steele v. Boley, 6 Utah, 308; Dolen v. Black, 48 Neb. 688; and see Canley v. Johnson, 21 Fed. Rep. 492.

10 Hagan v. Ellis, 39 Fla. 463, 63 Am. St. Rep. 167; and so, to same effect, Redfield v. Parks, 132 U. S. 239.

11 East Tennessee etc. R. R. Co. v. Davis, 91 Ala. 615; Newsome v. Snow, 91 Ala. 641, 24 Am. St. Rep. 934; Spratt v. Livingston, 32 Fla. 507; Eichelberger v. Gitt, 104 Pa. St. 64. See Michigan Land etc. Co. v. Thoney, 89 Mich. 226; Kerns v. Dean, 77 Cal. 557.

12 Long v. Stock Yards Co., 107 Mo. 298, 28 Am. St. Rep. 413. Compare Sherwood v. Baker, 105 Mo. 472, 24 Am. St. Rep. 399.

13 Franklin v. Dorland, 28 Cal. 175, 87 Am. Dec. 111; Lord v. Sawyer, 57 Cal. 67; Traip v. Traip, 57 Me. 268; Sherman v. Kane, 86 N. Y. 57.

14 Garabaldi v. Shattuck, 70 Cal. 511.

### § 252c. Tacking.

Privity of estate is absolutely necessary, in order that various periods of adverse possession created by different parties may be tacked together.<sup>1</sup> So the possession must be connected and continuous.<sup>2</sup> It is, however, held that such connection and continuity may be effected by any conveyance, agreement, or understanding that has for its object a transfer of the possession, and is accompanied by a transfer in fact.<sup>3</sup> The identity and continuity of possession, in order to make out the period required to bar the owner, may be shown by parol evidence.<sup>4</sup> But it must clearly appear that the particular premises claimed were

in fact embraced in the deed or transfer in whatever form it may have been made.<sup>5</sup> Adverse possession of the heir may be tacked to that of the ancestor;<sup>6</sup> so the adverse possession of a receiver may be tacked to that of the debtor;<sup>7</sup> and the adverse possession of an assignor may be tacked to that of the assignee.<sup>8</sup> But the possession of a grantor who had no color of title cannot be tacked to that of his grantee in order to make up the necessary period of possession under color of title.<sup>9</sup> Possession is not adverse when it is held by agreement with the true owner. And where the owner of the land, for a valuable consideration, agrees with the holder that suit for possession shall not be brought during the lifetime of either, the continuity of the possession is broken, and it ceases to be adverse.<sup>10</sup>

1 Allen v. McKay, 120 Cal. 332; Ross v. Goodwin, 88 Ala. 390; Louisville etc. R. R. Co. v. Philyaw, 88 Ala. 264; Erck v. Church, 87 Tenn. 575; and see sec. 252, ante.

2 Burnett v. Crawford, 50 S. C. 161, 166; Turner v. Hart, 71 Mich. 128, 15 Am. St. Rep. 243; Hollingsworth v. Sherman, 81 Va. 668.

3 Vandall v. St. Martin, 42 Minn. 163; Ramsey v. Glenny, 45 Minn. 401, 22 Am. St. Rep. 736.

4 Faloon v. Simshauser, 130 Ill. 649.

5 Ryan v. Schwartz, 94 Wis. 403.

6 Duren v. Kee, 26 S. C. 219; Alexander v. Gibbon, 118 N. C. 796, 54 Am. St. Rep. 757.

7 Verdery v. Railway Co., 82 Ga. 675.

8 Brown v. Brown, 106 N. C. 451.

9 Morrison v. Craven, 120 N. C. 327.

10 Dietrick v. Noel, 42 Ohio St. 18, 51 Am. Rep. 788.

**§ 253. Title by Estoppel.**

An estoppel is where a man is concluded by his own act or acceptance to say the truth.<sup>1</sup> It is so called because a man is excluded from saying anything, even the truth, against his own act or admission.<sup>2</sup> Its office is to preclude rights that cannot be asserted consistently with good faith and justice, and prevent wrongs for which there might be no adequate remedy.<sup>3</sup> It is a rule of law that a man shall always be estopped by his own deed, and shall not be allowed to aver or prove anything contrary to that which he has once solemnly alleged under seal.<sup>4</sup> If, therefore, it is manifest on the face of the conveyance, either by recital, admission, covenant, or in any other way, that the parties actually intended to convey and receive the identical estate and interest which is the subject matter purporting to be conveyed by the instrument they shall be held estopped from denying the operation of the deed according to its manifest intent.<sup>5</sup> Estoppels are said to be of two kinds: one personal in its character, operating as a personal rebutter, and preventing the grantor and those claiming under him from asserting title or contradicting the intent and effect of his deed;<sup>6</sup> the other, of larger scope, carries with it all the qualities and attributes of the former, and also possesses the additional function of operating an actual transfer of an after-acquired interest.<sup>7</sup> Thus, if one having

no title to land conveys the same with warranty to A, by a deed duly recorded, and he afterward acquires a title and conveys to B, the purchaser from B is estopped to aver that the grantor was not seised at the time of his conveyance to A, the first grantee.<sup>8</sup> The after-acquired title will feed the estoppel created by the conveyance to A, and conclude the grantor and all persons claiming under him;<sup>9</sup> and this is held to be so, although the deed to A was a deed poll.<sup>10</sup> The principle underlying an estoppel in pais, or equitable estoppel, is that it would be a fraud in a party to assert what his previous conduct and admissions have denied, when on the faith of that denial others have acted.<sup>11</sup> Thus, a person who, knowing that he himself has the title to a certain tract of land, nevertheless participates in inducing another to purchase it from a third person who has no title, will not be allowed afterward to assert his title for the purpose of defeating that of such purchaser.<sup>12</sup> So if one man encourages another to settle on land and expend his money in improving it, he who offers the inducement shall not afterward allege anything against the settler's title.<sup>13</sup> So if the owner of land intentionally leads the public to believe that he has dedicated it to public use, he will be estopped from contradicting the dedication, to the prejudice of those whom he may have misled.<sup>14</sup> And if one who has the equitable title dedicates land to the pub-

lic use, and afterward acquires the legal title, he will be estopped from denying the dedication.<sup>15</sup> So the doctrine of estoppel has been applied to the adjustments of boundaries between contiguous estates;<sup>16</sup> to the use of a well on the land of another to which the party claimed right by user;<sup>17</sup> to prevent a party from asserting a lien upon lands;<sup>18</sup> to the case of a claim to surplus moneys on the sale of lands;<sup>19</sup> and to preclude a party from asserting a secret equitable title as against the legal title.<sup>20</sup> But it is held that, under the statute of frauds, it is not permissible that an estoppel in pais should work a transfer of the legal title to land.<sup>21</sup>

1 Coke on Littleton, 352a; and see *Owen v. Bartholomew*, 9 Pick. 520; *Water's Appeal*, 35 Pa. St. 527, 78 Am. Dec. 354.

2 *Welland Canal Co. v. Hathaway*, 8 Wend. 483, 24 Am. Dec. 51; *Titus v. Morse*, 40 Me. 348, 63 Am. Dec. 665.

3 *Andrews v. Aetna Life Ins. Co.*, 12 N. Y. Week. Dig. 452, 85 N. Y. 334; *Buckingham v. Hanna*, 2 Ohio St. 551; *Van Rensselaer v. Kearney*, 11 How. 297; *Carver v. Jackson*, 4 Pet. 83.

4 *Douglass v. Scott*, 5 Ohio, 199; *Doe v. Dowdall*, 3 Houst. 369, 11 Am. Rep. 757; *Sinclair v. Jackson*, 8 Cow. 586; *Clark v. Baker*, 14 Cal. 629. A grantor may be held to be estopped by delivering a deed to afterward object that it is inoperative by reason of informality of execution: *Taylor v. Sangrain*, 1 Mo. App. 312.

5 *Trevivan v. Lawrence*, 1 Salk. 276; *Goodtitle v. Bailey*, Cowp. 597; *Byrne v. Morehouse*, 22 Ill. 603; *Denn v. Cornell*, 3 Johns. Cas. 506; *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35; *Root v. Crack*, 7 Pa. St. 380; *Jefferson v. Howell*, 1 Houst. 183; *Stow v. Wyse*, 7 Conn. 214, 18 Am. Dec. 99; *Bowman v. Taylor*, 2 Ad. & E.

278; *Carpenter v. Buller*, 8 Mees. & W. 212; *Kenny v. Aitken*, 12 N. Y. Week. Dig. 127; *Fredericks v. Davis*, 3 Mont. 251; *Reinhard v. Mining Co.*, 107 Mo. 616, 28 Am. St. Rep. 441; *De Frieze v. Quint*, 94 Cal. 653, 28 Am. St. Rep. 151; *Tyler v. Hall*, 106 Mo. 313, 27 Am. St. Rep. 337.

6 See *Doe v. Oliver*, 5 Moody & Ry. 202; *Helps v. Hereford*, 2 Barn. & Ald. 242; *Jackson v. Bradford*, 4 Wend. 619; *White v. Patten*, 24 Pick. 324; *Taylor v. Shufford*, 4 Hawks, 116, 15 Am. Dec. 512.

7 *Doe v. Dowdall*, 3 Houst. 369, 11 Am. Rep. 761; *McCusker v. McEvey*, 9 R. I. 528, 11 Am. Rep. 295; *Mickles v. Townsend*, 18 N. Y. 575; *Dudley v. Caldwell*, 19 Conn. 218; *Ford v. Unity Church Soc.*, 120 Mo. 498, 41 Am. St. Rep. 711; *Helps v. Hereford*, 2 Barn. & Ald. 242.

8 *White v. Patten*, 24 Pick. 324; *Chamberlain v. Meeder*, 16 N. H. 381; *Baxter v. Bradbury*, 20 Me. 260; *Pike v. Galvin*, 29 Me. 183; *Goodson v. Beacham*, 24 Ga. 150; *Doe v. Dowdall*, 3 Houst. 369, 11 Am. Rep. 761; *Brown v. M'Cormick*, 6 Watts, 60.

9 *McCusker v. McEvey*, 9 R. I. 528, 11 Am. Rep. 295; *Doe v. Oliver*, 5 Moody & Ry. 202; and see *House v. McCormick*, 57 N. Y. 310; *Burtners v. Keran*, 24 Gratt. 43.

10 *McCusker v. McEvey*, 9 R. I. 528, 11 Am. Rep. 295.

11 *Horn v. Cole*, 51 N. H. 287, 12 Am. Rep. 111; *Simpson v. Pearson*, 31 Ind. 1; *Terrell v. Weymouth*, 32 Fla. 255, 37 Am. St. Rep. 94, and note; *Estis v. Jackson*, 111 N. C. 145, 32 Am. St. Rep. 784, and note; and see *Zuchtmann v. Roberts*, 109 Mass. 53, 12 Am. Rep. 663; *Chandler v. White*, 84 Ill. 435; *Brant v. Virginia Coal etc. Co.*, 93 U. S. 326; *Chapman v. O'Brien*, 2 Jones & S. 524; *Holmes v. Crowell*, 73 N. C. 613; *Cairncross v. Lorimer*, 3 Macq. 829; *Bean v. Pettingill*, 7 Rob. (N. Y.) 7. But a party can never be estopped by an act that is illegal and void: *Mattox v. Hightshue*, 39 Ind. 95.

12 *Sherrill v. Sherrill*, 73 N. C. 8; *Gray v. Bartlett*, 20 Pick. 193; *Trustees etc. v. Smith*, 118 N. Y. 634; *Mattes v. Frankel*, 157 N. Y. 603, 68 Am. St. Rep. 804; *Hagan v. Ellis*, 39 Fla. 463, 63 Am. St. Rep. 167; and see *Snodgrass v. Ricketts*, 13 Cal. 359; *Winchell v. Edwards*, 57 Ill. 41; *Titus v. Morse*, 40 Me. 348; *Storrs v.*

Barker, 6 Johns. Ch. 166, 10 Am. Dec. 316; Moore v. Bowman, 47 N. H. 494; Davidson v. Silliman, 24 La. Ann. 225; Pickard v. Sears, 6 Ad. & E. 469.

13 McKelvy v. Trubey, 4 Watts & S. 323; Campbell v. Mays, 38 Iowa, 9; Henderson v. Overton, 2 Yerg. 394, 24 Am. Dec. 492. Compare Beaupland v. McKeen, 28 Pa. St. 124; Rochester Ins. Co. v. Martin, 13 Minn. 59; Jamison v. Cornell, 3 Hun. 557; Alabama etc. R. R. Co. v. Railroad Co., 84 Ala. 570, 5 Am. St. Rep. 401; Stone v. Tyree, 30 W. Va. 687; Gill v. Hardin, 48 Ark. 409; Hafter v. Strange, 65 Miss. 323, 7 Am. St. Rep. 659.

14 Hobbs v. Lowell, 19 Pick. 409; State v. Trask, 6 Vt. 355; Noyes v. Ward, 19 Conn. 250; Boyce v. Kalbaugh, 47 Md. 334, 28 Am. Rep. 464.

15 Mankato v. Willard, 13 Minn. 13.

16 Lavery v. Moore, 32 Barb. 351; Hoxey v. Clay, 20 Tex. 582; Clark v. Hulsey, 54 Ga. 608; and see Stanwood v. McLellan, 48 Me. 275; Rutherford v. Tracey, 48 Mo. 325, 8 Am. Rep. 104; Gove v. White, 23 Wis. 282; Stewart v. Carleton, 31 Mich. 270; Halloran v. Whitcomb, 43 Vt. 306.

17 Stevens v. Dennett, 51 N. H. 324; and see Pool v. Lewis, 41 Ga. 162.

18 Blackwood v. Jones, 4 Jones Eq. 56.

19 Water's Appeal, 35 Pa. St. 523.

20 Winchell v. Edwards, 57 Ill. 41; and see House v. McCormick, 57 N. Y. 310.

21 Hayes v. Livingston, 34 Mich. 384, 22 Am. Rep. 533; and see Davis v. Davis, 26 Cal. 23; Mills v. Graves, 38 Ill. 466; Ryder v. Flanders, 30 Mich. 344; Doe v. Walters, 16 Ala. 714. But see Bigelow v. Foss, 59 Me. 162; Brown v. Brown, 30 N. Y. 519; McCune v. McMichael, 29 Ga. 312; Shaw v. Beebe, 35 Vt. 205; De Herques v. Marti, 85 N. Y. 609; Robbins v. Moore, 129 Ill. 30; Cross v. Commission Co., 153 Ill. 499, 46 Am. St. Rep. 902.

### § 253a. Same—Continued.

As a general rule, a party claiming under a deed is estopped from denying any of the mate-

rial recitals therein, however contrary to the truth.<sup>1</sup> But it is held that such estoppel does not apply to or bind those claiming adversely, or to parties claiming by title acquired anterior to the date of the deed which, it is claimed, creates the estoppel.<sup>2</sup> Where land is conveyed without warranty, the grantor is not estopped, as a general rule, from setting up an after-acquired title.<sup>3</sup> On the other hand, a covenant of warranty works an estoppel.<sup>4</sup> And it is further held that where a conveyance recites or affirms, expressly or impliedly, that the grantor is seised of a particular estate which it purports to convey, he will be estopped to deny that such estate passed, although there be no warranty at all, and he is therefore estopped from setting up an after-acquired title to the estate thereby conveyed.<sup>5</sup> An heir apparent is estopped by his deed, with covenants of general warranty, from afterward claiming his inheritance, and such estoppel extends to his heirs.<sup>6</sup> But it is held that an heir, claiming an independent title in himself, is not estopped to assert it by the mere force of the covenants of his ancestor.<sup>7</sup> The rule of estoppel, based upon a common source of title, is said to be founded on sound reasoning and logical deduction. Hence, if two parties claim title from a third person, it is conceded that the latter had the title, and it need not be proved that he did have it.<sup>8</sup> If the rights of an ancestor in possession of land descend



to his heirs, each of them is estopped, whether his title was good or bad, from acquiring and asserting any adverse title to the property, and, if either acquires any paramount title, he holds it for the benefit of all.<sup>9</sup> By accepting a conveyance as a substitute for and a correction of a prior conveyance, the grantee and his heirs are estopped from claiming title under such prior conveyance as to lands not included in the substitute conveyance.<sup>10</sup> One who executes a deed to defraud creditors is estopped as to his grantee.<sup>11</sup> If a trustee having the legal estate divests it by deed in due form, he cannot, in a court of law, deny the title so created.<sup>12</sup> Covenants in a deed can have no greater validity than the deed itself, and, in order that such covenants may work an estoppel, the deed itself must be a valid instrument.<sup>13</sup> And one who receives a conveyance of property "subject to all liens of mortgages and taxes thereon" is not estopped from showing that an apparent mortgage is invalid.<sup>14</sup> But it is held that an executor is not estopped by his own void deed of land from suing to dispossess persons claiming under it.<sup>15</sup> The owner of property cannot be divested of it by a forged conveyance, but his conduct in reference to the instrument may estop him from denying its validity. As between himself and the person who committed the forgery, such estoppel may not arise, but if, with knowledge of the forgery, he should declare to an in-

nocent person that the signature was his own, and that he had executed the instrument, and thereby induced him to purchase the property, he could not afterward claim the property upon the ground that the instrument was a forgery.<sup>16</sup> Equitable estoppel depends upon the facts and circumstances of each particular case.<sup>17</sup> The general rule is that when a party, either by his words or conduct, has voluntarily induced a third person to act in a particular manner, he will not afterward be permitted to deny the truth of the admission, if the consequence would be to work an injury to such third person, or to some one claiming under him.<sup>18</sup> And the fact that it is real estate that is concerned, the title to which and the rights in which are generally to be affected by instruments in writing formally executed, does not prevent the operation of the estoppel.<sup>19</sup> Mere silence creates no estoppel, unless there was a duty to speak.<sup>20</sup> Married women are not estopped from asserting title to their lands, except for fraud;<sup>21</sup> and so of infants.<sup>22</sup> One who receives the proceeds of a defective sale of his property, with knowledge of the defects, is estopped from denying the purchaser's title.<sup>23</sup> And it is held that one who procures a decree that land shall be sold at a judicial sale, and who receives the proceeds thereof, is afterward estopped from asserting any interest in petroleum oil extracted from the land.<sup>24</sup> A stranger to the title

to land cannot invoke an equitable estoppel against the plaintiff in ejectment.<sup>25</sup>

1 Orthwein v. Thomas, 127 Ill. 561, 11 Am. St. Rep. 159; and see Moffatt v. Bulson, 96 Cal. 110, 31 Am. St. Rep. 195; Ambs v. Railway Co., 44 Minn. 269.

2 Cobb v. Oldfield, 151 Ill. 540, 42 Am. St. Rep. 263; citing Carver v. Jackson, 4 Pet. 83; Owen v. Robbins, 19 Ill. 555.

3 Doswell v. Buchanan, 3 Leigh, 365, 23 Am. Dec. 280.

4 Gregory v. Peoples, 80 Va. 355; Russ v. Alpaugh, 118 Mass. 376, 19 Am. Rep. 464; and see sec. 253, ante.

5 Reynolds v. Cook, 83 Va. 817, 5 Am. St. Rep. 317; citing Van Rensselaer v. Kearney, 11 How. 297; French v. Spencer, 21 How. 228; and see, as sustaining this doctrine, Magruder v. Esway, 35 Ohio St. 221; Batchelder v. Lovely, 69 Me. 33; Dorn v. Baker, 96 Cal. 209; Stewart v. Powers, 98 Cal. 518; Green v. Green, 103 Cal. 110; Mandaris v. Edwards, 32 Kan. 290; Yerkes v. Hadley, 5 Dak. Ter. 334; Baldwin v. Root, 90 Tex. 554; Jefferson v. Edrington, 53 Ark. 565; Terry v. Rodahan, 79 Ga. 278, 11 Am. St. Rep. 420; Ford v. Unity Church Soc., 120 Mo. 498, 41 Am. St. Rep. 711; Tyler v. Hall, 106 Mo. 313, 27 Am. St. Rep. 337.

6 Buford v. Adair, 43 W. Va. 211, 64 Am. St. Rep. 854; citing Hart v. Gregg, 32 Ohio St. 502.

7 Russ v. Alpaugh, 118 Mass. 369, 19 Am. Rep. 464; Trolan v. Rogers, 88 Hun, 422; New Orleans v. Gaines, 138 U. S. 595.

8 Alexander v. Gibbon, 118 N. C. 796, 54 Am. St. Rep. 757; Doyle v. Wade, 23 Fla. 90, 11 Am. St. Rep. 334; and see Bernhardt v. Brown, 122 N. C. 587, 65 Am. St. Rep. 725; Schwallback v. Railway Co., 69 Wis. 292, 2 Am. St. Rep. 740.

9 Pillow v. Improvement Co., 92 Va. 144, 53 Am. St. Rep. 804.

10 Chloupek v. Perotka, 89 Wis. 551, 46 Am. St. Rep. 858; and so, to same effect, Emeric v. Alvarado, 64 Cal. 529, 587; Fox v. Windes, 127 Mo. 502, 48 Am. St. Rep. 648.

- 11 *Peterson v. Brown*, 17 Nev. 172, 45 Am. Rep. 437; and see *Bush v. Rogan*, 65 Ga. 320, 38 Am. Rep. 785.
- 12 *Perth Amboy v. Ramsay*, 60 N. J. L. 1.
- 13 *Alt v. Banholzer*, 39 Minn. 511, 12 Am. St. Rep. 681; *Conrad v. Lane*, 26 Minn. 389, 37 Am. Rep. 412.
- 14 *Purdy v. Coar*, 109 N. Y. 448, 4 Am. St. Rep. 491.
- 15 *Chase v. Cartright*, 53 Ark. 358, 22 Am. St. Rep. 207.
- 16 *Blaisdell v. Leach*, 101 Cal. 405, 40 Am. St. Rep. 65; and see *Forsyth v. Day*, 46 Me. 176; *Greenfield Bank v. Crafts*, 4 Allen, 447.
- 17 *Terrell v. Weymouth*, 32 Fla. 255, 37 Am. St. Rep. 94.
- 18 *Trustees etc. v. Smith*, 118 N. Y. 634. So, to same effect, *Robinson Bank v. Miller*, 153 Ill. 244, 46 Am. St. Rep. 883; *Casler v. Byers*, 129 Ill. 657; *Armour v. Railroad Co.*, 65 N. Y. 111, 22 Am. Rep. 603.
- 19 *De Herques v. Marti*, 85 N. Y. 609; *Mattes v. Frankel*, 65 Hun. 203; affirmed, 157 N. Y. 604, 68 Am. St. Rep. 804; *Hagan v. Ellis*, 39 Fla. 463, 63 Am. St. Rep. 167.
- 20 *New York Rubber Co. v. Rothery*, 107 N. Y. 310, 1 Am. St. Rep. 822; and see *Shakman v. United States Credit System Co.*, 92 Wis. 366, 53 Am. St. Rep. 920; *Maple v. Kussart*, 53 Pa. St. 349, 91 Am. Dec. 214; *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891.
- 21 *Louisville etc. Ry. Co. v. Stephens*, 96 Ky. 401, 49 Am. St. Rep. 303; and see *Stone v. Sledge*, 87 Tex. 49, 47 Am. St. Rep. 65.
- 22 *Barham v. Turbeville*, 1 Swan, 437, 57 Am. Dec. 782; *Grigsby v. Peak*, 68 Tex. 235, 2 Am. St. Rep. 487.
- 23 *Niantic Mills Co. v. Oswego Mills*, 19 R. I. 34.
- 24 *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891; and see *Benevolent Soc. v. Murray*, 145 Mo. 622.
- 25 *Blodgett v. Perry*, 97 Mo. 263, 10 Am. St. Rep. 307. See *Hagan v. Ellis*, 39 Fla. 463, 63 Am. St. Rep. 167.

**§ 254. Accretion.**

If portions of soil are added to real estate already possessed, through the operation of natural causes, or by slow and imperceptible accretion, the owner of the land to which the addition has been made has a perfect title to that addition, and this is called title by accretion.<sup>1</sup> Alluvion is the addition made to land by the washing of the sea, a navigable river, or other stream, whenever the increase is so gradual that it cannot be perceived in any one moment of time.<sup>2</sup> And the right to future alluvial formations is a right inherent in the property, and an essential attribute of it;<sup>3</sup> the title thereto is the result of natural law, in consequence of the local situation of the land.<sup>4</sup> And it is held that the proprietor of lands bounded by a stream is entitled to all accretions thereto caused by the deposition of alluvion thereon, without regard to the question whether such accretions were formed solely by natural causes, or by such causes influenced by the artificial works of others, and without regard to the question whether such stream is navigable or not.<sup>5</sup> But all islands, and other increase, if sudden and considerable, arising in the sea and in navigable streams, belong to the sovereign or the state.<sup>6</sup> If an island is formed in a stream not navigable, so as to divide the channel and lie partly on each side of the thread of the stream, it will be divided between the riparian proprietors on the opposite

sides of the stream, according to the original thread thereof.<sup>7</sup> Seaweed thrown upon land by the sea is considered an accretion, and belongs to the owner of the soil.<sup>8</sup>

1 See *Lovington v. County of St. Clair*, 64 Ill. 56, 16 Am. Rep. 523; *St. Louis etc. Ry. Co. v. Ramsey*, 53 Ark. 314, 22 Am. St. Rep. 195; *Fillmore v. Jennings*, 78 Cal. 634; *Saunders v. Railroad Co.*, 144 N. Y. 75, 43 Am. St. Rep. 729; *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450; *St. Clair Co. v. Lovington*, 23 Wall. 46; *Benne v. Miller*, 149 Mo. 228.

2 *Trustees etc. v. Dickinson*, 9 Cush. 551; *Lovington v. County of St. Clair*, 16 Am. Rep. 527, note; 2 *Blackstone's Commentaries*, 262. See *Coulthard v. Stevens*, 84 Iowa, 247, 35 Am. St. Rep. 304, and note.

3 *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122; *King v. Lord Yarborough*, 3 Barn. & C. 91; 2 *Bligh*, N. S., 147.

4 *Municipality No. 2 v. Orleans Cotton Press*, 18 La. 122; *Lovington v. County of St. Clair*, 16 Am. Rep. 527, note; 23 Wall. 68; affirming 64 Ill. 56.

5 *Lovington v. County of St. Clair*, 64 Ill. 56, 16 Am. Rep. 523; 23 Wall. 68; *Adams v. Frothingham*, 3 Mass. 352, 3 Am. Dec. 151; *Banks v. Ogden*, 2 Wall. 57; *Warren v. Chambers*, 25 Ark. 120; *Middleton v. Pritchard*, 3 Scam. 510; and see *Attorney General v. Chambers*, 4 De Gex & J. 55; *Ford v. Lacy*, 7 Hurl. & N. 151; *New Orleans v. United States*, 10 Pet. 662; *King v. Lord Yarborough*, 3 Barn. & C. 91.

6 2 *Blackstone's Commentaries*, 262. See *Chandos v. Mack*, 77 Wis. 573, 20 Am. St. Rep. 139; *Bigelow v. Hoover*, 85 Iowa, 161, 39 Am. St. Rep. 296. If land once submerged by the sea shall again be left by the reflex and recess of the sea, the owner shall again have his land as before, if he can make out where and what it was: *Mulry v. Norton*, 61 How. Pr. 197; 100 N. Y. 424.

7 *Trustees etc. v. Dickinson*, 9 Cush. 548; *Deerfield v. Arms*, 17 Pick. 41, 28 Am. Dec. 276; *People v. Canal Appraisers*, 13 Wend. 355; *Girand v. Hughes*, 1 Gill & J. 249. See *Wiggenhorn v. Kountz*, 23 Neb. 690, 8 Am. St. Rep. 150.

8 *Emans v. Turnbull*, 2 Johns. 313, 3 Am. Dec. 427.  
See sec. 12, ante.

§ 254a. Same—Continued.

When grants of land border on running water, and the banks are changed by accretion, the riparian owner's boundary line still remains the stream, although, during the years, the actual area of his possessions may vary.<sup>1</sup> The doctrine of accretion has no application to land reclaimed by man through filling in land once under water and making it dry, and the title to land so filled in remains where it was before, unless the filling in was done wrongfully.<sup>2</sup> And land detached from one side of a river by a sudden change in the channel, and left connected with land on the other side, in such manner as to be capable of identification, is not an accretion.<sup>3</sup> The owners of adjacent uplands are entitled to lands formed by accretion or reliction in front of and contiguous to their property in certain proportions according to the formation of their respective shore lines.<sup>4</sup> A riparian proprietor, conveying lands adjacent to navigable waters, may so limit his grant as to reserve to himself subsequent accretions to the soil formed by the operation of natural causes.<sup>5</sup>

1 *Nebraska v. Iowa*, 143 U. S. 359. Compare *Welles v. Bailey*, 55 Conn. 292, 3 Am. St. Rep. 48; *Bennett v. Manufacturing Co.*, 103 Iowa, 207; *Noyes v. Board of Supervisors*, 104 Iowa, 174; *Mulry v. Norton*, 100 N. Y. 424; *Cox v. Arnold*, 129 Mo. 337, 50 Am. St. Rep. 450.

2 *Sage v. Mayor*, 154 N. Y. 61, 61 Am. St. Rep. 592; and see *Steers v. Brooklyn*, 101 N. Y. 51.

3 *Coulthard v. Davis*, 101 Iowa, 625.

4 *Mulry v. Norton*, 100 N. Y. 424. See, as to rule of apportionment, *Hubbard v. Manwell*, 60 Vt. 235, 6 Am. St. Rep. 110; *Kehr v. Snyder*, 114 Ill. 313, 55 Am. Rep. 866; *Benne v. Miller*, 149 Mo. 228.

5 *People v. Jones*, 112 N. Y. 597.

## § 255. Escheat.

The mode of acquiring title by escheat, as known to the English law, is of strictly feudal character, and does not exist in the United States.<sup>1</sup> It was an incident of feudal tenure, whereby, upon the death of the tenant without heirs, the estate resulted back to the lord of the fee.<sup>2</sup> So the English doctrine of escheats arising in consequence of a person being attainted of treason or felony is done away with in this country.<sup>3</sup> And the only ground of escheat practically known to our laws is where the owner dies intestate, leaving no inheritable blood;<sup>4</sup> in which case the lands escheat to the people, or fall back into the common ownership of the state.<sup>5</sup> But generally, a process known as an "inquest of office," or "office found," must be instituted and carried on in the name of the state, in order to complete its title to the escheated lands.<sup>6</sup> And the state takes the title which the party had, and none other, and takes it in the plight and extent by which he held it.<sup>7</sup> If a cestui que trust dies intestate, without heirs, the trustee will hold an absolute estate in the property, discharged of the



trust.<sup>8</sup> In Pennsylvania, an estate held in trust may be escheated when the trust has expired, and the trustee has no further active duties to perform.<sup>9</sup>

1 See 4 Kent's Commentaries, 424; *Ringgold v. Malot*, 1 Har. & J. 299.

2 2 Greenleaf's Cruise on Real Property, 193, 194; 3 Dane's Abridgment, 140; *Attorney General v. Mercer*, L. R. 8 App. 767.

3 U. S. Const., art. 3, sec. 3. As to the effect of the confiscation act (12 Stats. at Large, 589), see *Wallach v. Van Riewick*, 92 U. S. 202; *Semmes v. United States*, 91 U. S. 21; *Day v. Micon*, 18 Wall. 156.

4 *Sewall v. Lee*, 9 Mass. 363; *Bradley v. Dwight*, 62 How. Pr. 300.

5 4 Kent's Commentaries, 424; *Bradley v. Dwight*, 62 How. Pr. 300; *People v. Conklin*, 2 Hill, 67; *Wallace v. Harmstad*, 44 Pa. St. 501; *Matthews v. Ward*, 10 Gill & J. 443; *Jackson v. Jackson*, 7 Johns. 214; *Scott v. Cohen*, 2 Nott & McC. 293; *M'Caughal v. Ryan*, 27 Barb. 376; *Nettles v. Cummings*, 9 Rich. Eq. 440; *Montgomery v. Dorion*, 7 N. H. 475; *Donovan v. Pitcher*, 53 Ala. 411, 25 Am. Rep. 634; *Sands v. Lynham*, 27 Gratt. 291, 21 Am. Rep. 348; *Wallahan v. Ingersoll*, 117 Ill. 123; *Newman v. Crows*, 60 Fed. Rep. 220. The state takes, not as heir, but because there are no heirs: *State v. Ames*, 23 La. Ann. 69.

6 See 2 Washburn on Real Property, 444; *Commonwealth v. Hite*, 6 Leigh, 588, 29 Am. Dec. 226; *People v. Folsom*, 5 Cal. 373; *Matter of Desilver*, 5 Rawle, 111, 28 Am. Dec. 645. But see 4 Kent's Commentaries, 424; *M'Caughal v. Ryan*, 27 Barb. 376; *Holliman v. Peebles*, 1 Tex. 673; *Den v. O'Hanlon*, 21 N. J. L. 582; *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430.

7 4 Kent's Commentaries, 427; *Booland v. Dean*, 4 Mason, 174. See *Johnston v. Spicer*, 107 N. Y. 185; *Beavan v. Went*, 155 Ill. 592.

8 *Matthews v. Ward*, 10 Gill & J. 443. See *Burgess v. Wheate*, 1 W. Black. 123; 1 Eden, 177; *Hubbard v. Goodwin*, 3 Leigh, 492.

9 *Commonwealth v. Naile*, 88 Pa. St. 429.

**§ 256. Eminent Domain.**

Title to property is always held subject to the right of eminent domain;<sup>1</sup> that is, upon the implied condition that it must be surrendered to the government, either in whole or in part, when the public necessities, evinced according to the established forms of law, demand it.<sup>2</sup> The right is one appertaining to the sovereignty of the state, and may be freely exercised on proper occasions, upon allowing just compensation to the owner of the land taken.<sup>3</sup> And the legislature may authorize corporations or individuals, as well as agents of the government, to exercise the right.<sup>4</sup> But while the state, by virtue of its sovereignty, has the power to appropriate private property for public use, for the purpose of promoting the general welfare,<sup>5</sup> it has no right to take one man's property and give it to another.<sup>6</sup> And private property cannot be taken for private use, even though compensation be made.<sup>7</sup> The right is not a continuing one, unless so declared, and it is strictly construed.<sup>8</sup> Ordinarily, the interest vested in the public is only an easement, and when the use is discontinued and abandoned, the land reverts to the original owner.<sup>9</sup> But the legislature may authorize the entire interest of the owner to be taken, upon the payment of a just compensation, if it deem the public exigency demands it.<sup>10</sup>

1 Gilmer v. Lime Point, 18 Cal. 229; Bailey v. Mitten-Boone Real Prop.—53

berger, 31 Pa. St. 37; and see Boone on Corporations, sec. 91.

2 People v. New York, 32 Barb. 102; Little Rock etc. R. R. Co. v. Woodruff, 49 Ark. 381, 4 Am. St. Rep. 51; Carthage v. Frederick, 122 N. Y. 268, 19 Am. St. Rep. 490. The right of eminent domain in no sense depends upon any contract between the owner and the public: Lamb v. Shottler, 54 Cal. 319.

3 Weer v. St. Paul etc. R. R. Co., 18 Minn. 155; Ash v. Cummings, 50 N. H. 591; White v. Nashville etc. R. R. Co., 7 Heisk. 518; Scudder v. Trenton etc. Co., 1 N. J. Eq. 694, 23 Am. Dec. 756; Wisconsin Water Co. v. Winans, 85 Wis. 26, 39 Am. St. Rep. 813.

4 In re Fowler, 53 N. Y. 60; Boone on Corporations, sec. 92; Beekman v. Saratoga R. R. Co., 3 Paige, 45, 22 Am. Dec. 679; Little Rock etc. R. R. Co. v. Woodruff, 49 Ark. 381, 4 Am. St. Rep. 51.

5 Richardson v. Vermont Cent. R. R. Co., 25 Vt. 465; Matter of Bloomfield Gas Light Co. v. Richardson, 63 Barb. 437; Cooper v. Williams, 4 Ohio, 253, 22 Am. Dec. 745.

6 Brown v. Beatty, 34 Miss. 227; People v. White, 11 Barb. 26; Harding v. Goodlett, 3 Yerg. 40, 24 Am. Dec. 546. The right of eminent domain extends to corporate franchises, and by virtue of that right the bridge of a corporation can be taken for public use, and made a free bridge: In re Towanda Bridge Co., 91 Pa. St. 216.

7 Scudder v. Trenton etc. Co., 1 N. J. Eq. 694, 23 Am. Dec. 756; Wild v. Deig, 43 Ind. 455, 13 Am. Rep. 399; Osborn v. Hart, 24 Wis. 89, 1 Am. Rep. 161; Welton v. Dickson, 38 Neb. 767, 41 Am. St. Rep. 684; Wisconsin Water Co. v. Winans, 85 Wis. 26, 39 Am. St. Rep. 813.

8 People v. White, 11 Barb. 26; Commissioners v. Humphrey, 47 Ga. 565; Huddleston v. Eugene (Sup. Ct. Or.), 55 Pac. Rep. 868, 872; Charlottesville v. Maury, 96 Va. 383; and see Boone on Corporations, secs. 94, 96.

9 See Boone on Corporations, secs. 95, 250; Livermore v. Jamaica, 23 Vt. 361; People v. White, 11 Barb. 26; Hibernia R. R. Co. v. De Camp, 47 N. J. L. 518, 54 Am. Rep. 197; Malone v. Toledo, 34 Ohio St. 541; sec. 147, ante.

10 Boone on Corporations, sec. 95; De Varaigne v. Fox, 2 Blatchf. 95; Heyward v. Mayor etc., 7 N. Y. 314. See sec. 256b, post.

### § 256a. Same—Continued.

The proceeding to take private property for public use is an exercise by the state of its sovereign right of eminent domain, and with its exercise the United States has no right to interfere by any of its departments.<sup>1</sup> But the right of eminent domain may be exercised by the federal government within the states;<sup>2</sup> though it has been denied that the state can exercise the right in behalf of the United States.<sup>3</sup> Public use and a legislative warrant of the necessity of the taking must coexist as conditions precedent to the right of condemnation of land under the exercise of the right of eminent domain.<sup>4</sup> The necessity and expediency of exercising the right is a legislative question, but whether the proposed use is in fact public is a judicial question, to be declared by the courts.<sup>5</sup> Forbidding by statute the use of property in a manner hurtful to the health and comfort of the community is not a taking of the property for "public use" within the meaning of the constitution, but is a proper and valid exercise of the police power vested in the state.<sup>6</sup>

1 Boom Co. v. Patterson, 98 U. S. 403.

2 Kohl v. United States, 91 U. S. 373.

3 Darlington v. United States, 82 Pa. St. 387, 22 Am. Rep. 768. But see Burt v. Insurance Co., 106 Mass. 363,

8 Am. Rep. 341; *Orr v. Quinley*, 54 N. H. 592; *Matter of Petition of United States*, 96 N. Y. 234.

4 *Tracy v. Railroad Co.*, 80 Ky. 259; *Railway Co. v. Telford*, 89 Tenn. 293; *Wisconsin Water Co. v. Winans*, 85 Wis. 26, 39 Am. St. Rep. 813.

5 *Bridal Veil Lumbering Co. v. Johnson*, 30 Or. 205, 60 Am. St. Rep. 818; *Apex Transp. Co. v. Garbade*, 32 Or. 582; *Wisconsin Water Co. v. Winans*, 85 Wis. 26, 39 Am. St. Rep. 813; *Welton v. Dickson*, 38 Neb. 767, 41 Am. St. Rep. 771; *In re Niagara etc. Ry. Co.*, 108 N. Y. 375; *Tyler v. Beacher*, 44 Vt. 648, 8 Am. Rep. 398; *Wulzen v. Supervisors*, 101 Cal. 15, 40 Am. St. Rep. 17. Compare *Lynch v. Forbes*, 161 Mass. 302, 42 Am. St. Rep. 402, and note.

6 *Scovill v. McMahon*, 62 Conn. 378, 36 Am. St. Rep. 350; and see *Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3.

### § 256b. Same—What Property may be Taken.

In general terms, not only an absolute fee in lands, but a right of way over it, or any easement or right connected with it, may be taken by right of eminent domain.<sup>1</sup> No property is exempt from the power of eminent domain, and the fact that lands have previously been devoted to cemetery purposes does not place them beyond its reach. The dwellings of the living and the resting places of the dead may be alike condemned.<sup>2</sup> Property already devoted to public uses may be taken, as where the property of one railroad company is taken for the benefit of another.<sup>3</sup> The power of the legislature to authorize the taking of land, already applied to one public use, and devote it to another, is said to be unquestioned.<sup>4</sup> But the power to take the property for the sec-

ond public use, when such an appropriation would supersede or defeat the first one, must be given expressly or by necessary implication.<sup>5</sup> So it is well settled law that the right of eminent domain must be exercised in the manner and upon the terms and conditions prescribed by the act conferring the power.<sup>6</sup> And where a statute has defined what interest or estate may be taken under condemnation proceedings, no less interest or estate than that specified can be so taken. Hence, under a power to condemn the fee in lands, the right to condemn merely the use of water flowing through the land cannot be exercised.<sup>7</sup>

1 *Johnston v. Railroad Co.*, 18 R. I. 642, 49 Am. St. Rep. 800; *Gerhard v. Bridge Commrs.*, 15 R. I. 334; *Indianapolis v. Kingsbury*, 101 Ind. 200, 51 Am. Rep. 749.

2 *Matter of Board of Street Opening*, 133 N. Y. 329, 28 Am. St. Rep. 640.

3 *Toledo etc. Ry. Co. v. Detroit etc. R. R. Co.*, 62 Mich. 564, 4 Am. St. Rep. 875; *Appeal of Pittsburg etc. R. R. Co.*, 122 Pa. St. 511, 9 Am. St. Rep. 128; *Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508; and see *Chicago etc. Ry. Co. v. Starkweather*, 97 Iowa, 159, 59 Am. St. Rep. 404; *Portland etc. R. R. Co. v. Portland*, 14 Or. 188, 58 Am. Rep. 299.

4 *Evergreen Cemetery Assn. v. New Haven*, 43 Conn. 234, 21 Am. Rep. 643; and see *St. Louis etc. Ry. Co. v. Depot Co.*, 125 Mo. 82; *Cincinnati etc. Ry. Co. v. Belle Center*, 48 Ohio St. 273; *Fort Wayne v. Railway Co.*, 132 Ind. 565, 32 Am. St. Rep. 277; *Old Colony Ry. Co. v. Water Co.*, 153 Mass. 561.

5 *Little Nestucca Road Co. v. Tillamook Co.*, 31 Or. 1, 65 Am. St. Rep. 802; *Louisville etc. Ry. Co. v. County Court*, 95 Ky. 215, 44 Am. St. Rep. 220; *Chicago etc. Ry. Co. v. Starkweather*, 97 Iowa, 159, 59 Am. St. Rep.

404; *Matter of Mayor etc.*, 135 N. Y. 253, 31 Am. St. Rep. 825.

6 See *Murphy v. De Groot*, 44 Cal. 51; *Howe v. Norman*, 13 R. I. 488; *Colville v. Judy*, 73 Mo. 651; *Alexandria etc. R. R. Co. v. Railroad Co.*, 75 Va. 780, 40 Am. Rep. 743.

7 *Charlottesville v. Maury*, 96 Va. 383; *Roanoke City v. Berkowitz*, 80 Va. 616.

**§ 256c. Same—Public Use, Additional Servitude, etc.**

A public use to which property is appropriated by right of eminent domain need not be for the benefit of the whole public. It may be for the benefit of the inhabitants of a small or restricted locality, but the use and benefit must be in common, and not to particular individuals.<sup>1</sup> The use of water for irrigation purposes may become a public use.<sup>2</sup> So of the use of water to supply a town, and the water of a creek may be condemned therefor.<sup>3</sup> The servitude acquired by the taking of land for a public way is that of a public use for the convenience of the public, to be molded and applied as public necessity or convenience may demand, and as the methods of mankind may, from time to time, require. Hence, the authorized use of a public street for street railway purposes, no matter what the motor power may be, is not the imposition of an additional servitude for which an abutting property owner is entitled to additional compensation.<sup>4</sup> And the same has been held with respect to the reasonable use of city streets for the poles, wires, and neces-

sary equipment of a telephone system.<sup>5</sup> But some authorities are to the effect that when the fee in the bed of a street or highway is in the abutting land owner, the planting of a telegraph or telephone pole therein is an additional servitude imposed upon the land, for which such owner is entitled to compensation of which he cannot be deprived by statute.<sup>6</sup> It is likewise held that the laying of underground gaspipes in a country highway imposes an additional servitude, for which compensation must be first made to the land owners.<sup>7</sup> And that the taking of land for a highway does not give a town the right to erect a watch-house or other public building within the limits of the highway.<sup>8</sup> But it has been held that the use of a street for laying pipes and constructing drains, sewers, and culverts, does not impose an additional servitude on the land, so as to prevent the conversion of a public road into a city street without additional compensation to the owner of the fee.<sup>9</sup>

1 *Coster v. Tide Water Co.*, 18 N. J. Eq. 54; *Pocantico Water Works Co. v. Bird*, 130 N. Y. 249; *Butte etc. Ry. Co. v. Montana etc. Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508; *Welton v. Dickson*, 38 Neb. 767, 41 Am. St. Rep. 771.

2 *Paxton etc. Land Co. v. Farmers' etc. Land Co.*, 45 Neb. 884, 50 Am. St. Rep. 585; *In re Madera Irr. Dist.*, 92 Cal. 296, 27 Am. St. Rep. 106; *Umatilla Irr. Co. v. Barnhart*, 22 Or. 389.

3 *St. Helena Water Co. v. Forbes*, 62 Cal. 182, 45 Am. Rep. 659.

4 *Koch v. Street Ry. Co.*, 75 Md. 222; *San Antonio etc.*



St. Ry. Co. v. Limburger, 88 Tex. 79, 53 Am. St. Rep. 730; Taylor v. Street Ry. Co., 91 Me. 193, 64 Am. St. Rep. 216; Halsey v. Street Ry. Co., 47 N. J. Eq. 380; Rafferty v. Traction Co., 147 Pa. St. 579, 30 Am. St. Rep. 763; Taggart v. Street Ry. Co., 16 R. I. 668; Briggs v. Railroad Co., 79 Me. 363, 1 Am. St. Rep. 316; Detroit City Ry. Co. v. Mills, 85 Mich. 634; Doane v. Railway Co., 165 Ill. 510, 56 Am. St. Rep. 265; and see Gans Mfg. Co. v. Railroad Co., 113 Mo. 308, 35 Am. St. Rep. 706. But see contra, Chicago etc. Ry. Co. v. Railway Co., 95 Wis. 561, 60 Am. St. Rep. 136; Adams v. Railroad Co., 39 Minn. 286, 12 Am. St. Rep. 644; Penn etc. Ins. Co. v. Heiss, 141 Ill. 35, 33 Am. St. Rep. 273; Jaynes v. Street Ry. Co., 53 Neb. 631.

5 Magee v. Overshiner, 150 Ind. 127, 65 Am. St. Rep. 358. See, also, Julia Bldg. Assn. v. Bell Tel. Co., 88 Mo. 258, 57 Am. Rep. 398; People v. Eaton, 100 Mich. 208; Cater v. Telephone Exchange Co., 60 Minn. 539, 51 Am. St. Rep. 543; Pierce v. Drew, 136 Mass. 75, 49 Am. Rep. 7; Hershfield v. Telephone Co., 12 Mont. 102; McCormick v. District of Columbia, 4 Mackey, 396, 54 Am. Rep. 281.

6 Chesapeake etc. Tel. Co. v. Mackenzie, 74 Md. 36, 28 Am. St. Rep. 219; Stowers v. Postal Tel. etc. Co., 68 Miss. 559, 24 Am. St. Rep. 290; and see Western etc. Co. v. Williams, 86 Va. 696, 19 Am. St. Rep. 908; Broome v. Telegraph Co., 42 N. J. Eq. 141; Eels v. Telegraph etc. Co., 143 N. Y. 133; Pacific Cable Co. v. Irvine, 49 Fed. Rep. 113.

7 Sterling's Appeal, 111 Pa. St. 35, 56 Am. Rep. 246; Kincaid v. Natural Gas Co., 124 Ind. 577, 19 Am. St. Rep. 113.

8 Winchester v. Capron, 63 N. H. 605, 56 Am. Rep. 554; and see Board of Trade v. Barnett, 107 Ill. 507, 47 Am. Rep. 453; Murray v. Gibson, 21 Ill. App. 488.

9 Huddleston v. Eugene (Sup. Ct., Or.), 55 Pac. Rep. 868; and so, to same effect, Malone v. Toledo, 28 Ohio St. 643; Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618; Crooke v. Waterworks Co., 29 Hun, 245.

### § 256d. Same—Compensation, etc.

Private property cannot be compulsorily taken for any but a public use, and then only upon just compensation being made.<sup>1</sup> And it is held that

constitutional provisions making water for sale, rental, or distribution a public use, do not grant power to appropriate water for the use of the public without compensation.<sup>2</sup> The compensation must be limited to the tract a portion of which is actually taken.<sup>3</sup> The mortgagee of land taken by a city for a public street is an owner within the meaning of the statute governing condemnation proceedings, and he may recover from the city the damages awarded, although the amount has already been paid to the mortgagor.<sup>4</sup> Injunction will lie to restrain a town from opening streets and alleys through one's land against his consent, without having the same first lawfully taken and condemned, and compensation to the owner ascertained, in the mode prescribed by law.<sup>5</sup> And where property is already devoted to one public use, it cannot be taken for another without first making compensation to the persons interested in the previous public use. Thus, lands used as a public toll road cannot be taken for public highways free from such tolls, unless the owners of the toll road are compensated for moneys expended by them in acquiring the right of way in making improvements.<sup>6</sup>

1 *Welton v. Dickson*, 38 Neb. 767, 41 Am. St. Rep. 771; *Washington Ice Co. v. Chicago*, 147 Ill. 327, 37 Am. St. Rep. 222.

2 *People v. Lumber Co.*, 107 Cal. 21, 48 Am. St. Rep. 125.

3 *Currie v. Railroad Co.*, 52 N. J. L. 381, 19 Am. St. Rep. 452, and note, as to measure of compensation.

See, also, *Pennsylvania Co. v. Railroad Co.*, 151 Pa. St. 334, 31 Am. St. Rep. 762, and note.

4 *Sherwood v. Lafayette*, 109 Ind. 411, 58 Am. Rep. 414; *Gimbel v. Stolte*, 59 Ind. 446; and see *Philadelphia etc. Ry. Co. v. Williams*, 54 Pa. St. 103.

5 *Mason City Min. Co. v. Mason*, 23 W. Va. 211; *Yates v. Grafton*, 33 W. Va. 507; *Jarvis v. Grafton*, 44 W. Va. 453.

6 *Little etc. Road Co. v. County*, 31 Or. 1, 65 Am. St. Rep. 802.

### § 257. Public Grant.

The mode of creating a title in an individual to lands previously belonging to the government is by public grant.<sup>1</sup> The title in such case is evidenced by an instrument called a patent, which, when regularly and properly issued, invests the party with a complete, perfect title.<sup>2</sup> The patent is conclusive evidence of the validity of the original grant, and of its recognition and confirmation, and of the survey and its conformity with the confirmation, and of the relinquishment to the patentee of all interest of the government in the land.<sup>3</sup> And while it remains in force it is conclusive as against a junior patent for the same lands.<sup>4</sup> And it is held that recitals in a patent are evidence against a person in possession of the land without title.<sup>5</sup> So the action of the land officers in the land department of the general government, in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, in all courts and in all forms of judicial proceedings,

where the legal title must control.<sup>6</sup> But courts of equity have power to reform or correct patents, or to declare them void, or to grant other appropriate relief in cases of fraud, mistake, or other special ground of equity jurisdiction, when private rights are invaded.<sup>7</sup> A patent is not necessary in all cases to confer a legal title to soil, of which the government is the proprietor, and an act of Congress may divest the United States at once of all property in a portion of the public lands, and transfer it to an individual.<sup>8</sup> And there are no particular terms necessary to constitute a grant by the legislature.<sup>9</sup> All the lands in the territories, in the first instance, belong exclusively to the United States, subject to their absolute and discretionary disposal;<sup>10</sup> and no state or territory has a right to interfere with this exclusive control.<sup>11</sup> Where public lands bounded on streams or other waters are granted by the United States without reservation or restrictions, the riparian rights of the grantee are determined by the law of the state in which the lands are situated.<sup>12</sup>

1 See 2 Washburn on Real Property, 517; *Perkins v. Blood*, 36 Vt. 273; *Coe v. Bradley*, 49 Me. 388; *Doe v. Beardsley*, 2 McLean, 412; *Rice v. Railroad Co.*, 1 Black, 358; *Innes v. Crawford*, 2 Bibb, 412; *Lansing v. Smith*, 4 Wend. 9, 21 Am. Dec. 89.

2 *Patterson v. Tatum*, 3 Saw. 164; *Gibson v. Chouteau*, 13 Wall. 92; *Green v. Lister*, 8 Cranch, 229; *Goodlet v. Smithson*, 5 Port. 245, 30 Am. Dec. 561; *Hoofnagle v. Anderson*, 8 Cranch, 229; *Boardman v. Reed*, 6 Pet. 328; *Grignon v. Astor*, 2 How. 319; *Doe v. McKilvain*, 14

Ga. 252; *Astrom v. Hammond*, 3 McLean, 107; *Roods v. Symmes*, 1 Ohio, 281, 13 Am. Dec. 621; *Moore v. Robbins*, 96 U. S. 530. See *McGarrahan v. Mining Co.*, 96 U. S. 316. A patent issued without authority of law, or by an officer unauthorized to grant it, is no evidence of title: *Todd v. Fisher*, 26 Tex. 239; and see *Johnson v. Drew*, 34 Fla. 130, 43 Am. St. Rep. 172; *Foss v. Hinkell*, 78 Cal. 158; *Knight v. Land Assn.*, 142 U. S. 161.

3 *Boggs v. Merced Co.*, 14 Cal. 361; *Luse v. Clark*, 18 Cal. 535; and see *Maxey v. O'Connor*, 23 Tex. 238; *Omaha etc. R. R. Co. v. Tabor*, 13 Colo. 53, 16 Am. St. Rep. 193; *De Guyer v. Banning*, 91 Cal. 402; 167 U. S. 743; *Houck v. Kelsey*, 17 Kan. 336; *Harris v. McKissack*, 34 Miss. 464.

4 *Jackson v. Lawton*, 10 Johns. 24, 6 Am. Dec. 311; *Smelting Co. v. Kemp*, 104 U. S. 636.

5 *Boatner v. Ventress*, 8 Mart., N. S., 644, 20 Am. Dec. 266; *Bagnell v. Broderick*, 13 Pet. 436; *Steiner v. Coxe*, 4 Pa. St. 28; *Downing v. Gallagher*, 2 Serg. & R. 455; *McGarrahan v. New Idria Min. Co.*, 49 Cal. 331.

6 *Johnson v. Towsley*, 13 Wall. 72; *Garland v. Wynn*, 20 How. 6; *Moore v. Robbins*, 96 U. S. 535; *Powers v. Leith*, 53 Cal. 712; *Lamont v. Stimson*, 3 Wis. 545; *Boyce v. Dunn*, 29 Mich. 146; *State v. Bachelder*, 7 Minn. 121; *Plummer v. Brown*, 70 Cal. 544; *Johnson v. Drew*, 34 Fla. 130, 43 Am. St. Rep. 172; *Shepley v. Cowan*, 91 U. S. 340; *Quinby v. Conlan*, 104 U. S. 426.

7 *Johnson v. Towsley*, 13 Wall. 72; *Moore v. Robbins*, 96 U. S. 530; *Bisson v. Curry*, 35 Iowa, 72; *United States v. Throckmorton*, 98 U. S. 61; *Lyrte v. Arkansas*, 22 How. 203. Compare *Sacramento Sav. Bank v. Hynes*, 50 Cal. 195; *Cummings v. Powell*, 116 Mo. 473, 38 Am. St. Rep. 610; *Quinby v. Conlan*, 104 U. S. 426; *Smelting Co. v. Kemp*, 104 U. S. 626.

8 *Boatner v. Ventress*, 8 Mart., N. S., 644, 20 Am. Dec. 266; and see *Bloomer v. Stolley*, 5 McLean, 158; *Terrett v. Taylor*, 9 Cranch, 50; *Strother v. Lucas*, 12 Pet. 454; *Hall v. Jarvis*, 65 Ill. 302; *Sterling v. Jackson*, 69 Mich. 488, 13 Am. St. Rep. 405.

9 *Ward v. Bartholomew*, 6 Pick. 409; *Proprietors etc. v. Permit*, 5 N. H. 280, 20 Am. Dec. 580; and see *Fletcher v. Peck*, 6 Cranch, 87; *Sargent v. Simpson*, 8 Me. 148.

10 *Irvine v. Marshall*, 20 How. 558; *Johnson v. McIntosh*, 8 Wheat. 543; *Pratt v. Brown*, 3 Wis. 603. See *Worcester v. Georgia*, 6 Pet. 543; *Doe v. Beardsley*, 2 McLean, 412.

11 *Irvine v. Marshall*, 20 How. 558; *Gibson v. Chouteau*, 13 Wall. 92. Acceptance of a patent for lands, issued by the government, is essential to its taking effect: *Leroy v. Jamison*, 3 Saw. 369; and see *Moore v. Robbins*, 96 U. S. 530. As to the construction and validity of patents for lands, generally, consult *Lyon v. Fairbank*, 79 Wis. 455, 24 Am. St. Rep. 732, and note; *Edwards v. Rolley*, 96 Cal. 408, 31 Am. St. Rep. 234, and note; *Cummings v. Powell*, 116 Mo. 473, 38 Am. St. Rep. 610; *Lamprey v. Mead*, 54 Minn. 290, 40 Am. St. Rep. 328; *Saunders v. Railroad Co.*, 144 N. Y. 75, 43 Am. St. Rep. 729; *Lyne v. Sanford*, 82 Tex. 58, 27 Am. St. Rep. 852.

12 *Lamprey v. State*, 52 Minn. 181, 38 Am. St. Rep. 541. See *Hardin v. Jordan*, 140 U. S. 371.

## § 258. Pre-emption.

Pre-emption is a right secured by law to bona fide settlers on the public lands, giving them a preference over others in the purchase of such land.<sup>1</sup> But a mere entry by a settler upon land, with continued occupancy and improvement thereof, gives no vested interest in it.<sup>2</sup> His settlement protects him from intrusion or purchase by others, but confers no right against the government.<sup>3</sup> He has no title or estate in the land which he can sell or encumber;<sup>4</sup> nor is a pre-emption right an estate of which a widow can be endowed.<sup>5</sup> The land continues subject to the absolute disposing power of Congress until the settler has made the required proof of settlement and improvement, and has paid the purchase

money.<sup>6</sup> But when the purchase money has been paid, and the receipt of the proper land officer has been given to the purchaser, he obtains a vested right in the land.<sup>7</sup> And a pre-emptive right to enter lands acquired by an intestate will descend to his heirs.<sup>8</sup> The land office of the United States has the power to cancel all entries of public lands at any time before a patent issues thereon, on proof that the entryman has failed to comply with the law and has procured his final receipt or certificate on false evidence.<sup>9</sup>

1 U. S. Rev. Stats., c. 4; *Craig v. Tappan*, 2 Sand. Ch. 78; *Lyrte v. Arkansas*, 9 How. 328; *Hosmer v. Wallace*, 97 U. S. 575; *Quinby v. Conlan*, 104 U. S. 420; *United States v. Steenerson*, 50 Fed. Rep. 504.

2 *Whitney v. Frisbie*, 9 Wall. 189. See *Atherton v. Fowler*, 96 U. S. 513; *Pickard v. Kelley*, 52 Cal. 89.

3 *Whitney v. Frisbie*, 9 Wall. 189.

4 *Craig v. Tappan*, 2 Sand. Ch. 78; *Moffatt v. Bulson*, 96 Cal. 106, 31 Am. St. Rep. 192; *Nichols v. Council*, 51 Ark. 26, 14 Am. St. Rep. 20; *Anderson v. Carkins*, 135 U. S. 483. Compare *Delauney v. Burnett*, 4 Gilm. 454; *Sweesey v. Sparling*, 81 Iowa, 433, 25 Am. St. Rep. 506; *Rose v. Nevada etc. Co.*, 73 Cal. 385; *Montgomery v. Land Bureau*, 94 Cal. 284, 28 Am. St. Rep. 122.

5 *Davenport v. Farrar*, 1 Scam. 314.

6 *Brown v. Throckmorton*, 11 Ill. 529; *Busch v. Donohue*, 31 Mich. 482; *Grand Gulf R. R. v. Bryan*, 8 Smedes & M. 268; *Hutton v. Frisbie*, 37 Cal. 475; *Bower v. Higbee*, 9 Mo. 261; *Whitney v. Frisbee*, 9 Wall. 189, 195; *Yosemite Valley Case*, 15 Wall. 77; *Wells v. Pennington County*, 2 S. Dak. 1, 39 Am. St. Rep. 758; *Henry v. Welch*, 4 La. 547, 23 Am. Dec. 490.

7 *Frisbie v. Whitney*, 9 Wall. 187; *Gregory v. Kenyon*, 34 Neb. 640; *Godding v. Decker*, 3 Colo. App. 198; *Deffebach v. Hawke*, 115 U. S. 392.

8 *Johnson v. Collins*, 12 Ala. 322; *Bernier v. Bernier*, 147 U. S. 243. Equity will recognize no resulting trust in favor of one who enters land in the name of another to evade the pre-emption laws: *Higgins v. Higgins*, 55 Mo. 346.

9 *Figg v. Hensley*, 52 Cal. 299; *Parsons v. Venzke*, 4 N. Dak. 457, 50 Am. St. Rep. 669; *Judd v. Randall*, 36 Minn. 12; *Jones v. Meyers*, 2 Idaho, 793, 35 Am. St. Rep. 259.

### § 259. Land Warrant.

Land warrants by the laws of some of the states are not mere chattels, but are regarded as a kind of inchoate title to lands, and descend to heirs.<sup>1</sup> An entry upon land under a land warrant can be made only in the name of the person to whom it was issued, or in the name of his assignee.<sup>2</sup> The assignee of a land warrant fraudulently procured from the government has no higher legal rights than the warrantee;<sup>3</sup> and the government, though the warrant be regular on its face, is not estopped to deny its validity, although it be in the hands of an assignee for value and without notice.<sup>4</sup>

1 See *Reeder v. Barr*, 4 Ohio, 458, 22 Am. Dec. 762; *Brush v. Ware*, 15 Pet. 93. But see *Moody v. Hutchinson*, 44 Me. 57.

2 *Galt v. Galloway*, 4 Pet. 332; and see *Thomas v. Boerner*, 25 Mo. 27; *Fort v. Wilson*, 3 Iowa, 153.

3 *Bronson v. Keokuk*, 3 Dill. 490.

4 *Bronson v. Keokuk*, 3 Dill. 490.

### § 260. By Execution.

The title derived from the sale by some officer of the law, under an execution, owes its origin to modern legislation, and was unknown to the common law.<sup>1</sup> The acquisition of title in this way is



a proceeding in invitum, the requisites of which are prescribed by positive law;<sup>2</sup> and a strict compliance with these requisites is indispensable to a transfer of title.<sup>3</sup> Statutory provisions on the subject vary in the different states, and the statutes of the particular state should be consulted.<sup>4</sup> It is held in the New England states that where the land of one person is transferred to another under an execution, it must appear by the officer's return, either expressly or by necessary inference, that he has proceeded according to the statute and if it does not so appear, the defect cannot be supplied by evidence aliunde.<sup>5</sup> It is generally required of the creditor that he resort, in the first instance, to the personal estate of the debtor, as the proper and primary fund, and to look only to the real estate after the former is exhausted and found insufficient.<sup>6</sup> But the neglect of the officer to do so has been held not to affect the purchaser at an execution sale.<sup>7</sup> Nor is such purchaser affected, though the execution be subsequently quashed;<sup>8</sup> nor even if the judgment was paid, if no satisfaction appeared on record, and he was a purchaser without notice.<sup>9</sup> And where land is regularly sold on execution, a reversal of the judgment afterward will not divest the title of the purchaser.<sup>10</sup> But the rule of caveat emptor applies, and there is no warranty of title.<sup>11</sup> In those states in which the sheriff sells the land, he must execute a deed thereof to the purchaser

in the mode prescribed by statute;<sup>12</sup> and, unless otherwise provided by statute, the purchaser acquires no right of entry upon the land until he obtains a deed.<sup>13</sup> But in many of the states, a sale of lands by a sheriff, under an execution, is held not to be within the statute of frauds.<sup>14</sup> The sale is not void, but may be enforced by the purchaser against the sheriff, and the giving of a deed compelled.<sup>15</sup> But the purchaser acquires no such title to the land as may be sold on execution against him, until a valid deed is executed.<sup>16</sup> A deed executed by the sheriff before the expiration of the period of redemption fixed by law is inoperative, because at the time when the deed was executed he had no authority to make it.<sup>17</sup> And a sheriff's deed, made pursuant to a sale under an execution issued on a judgment in an action against a person who was dead at its institution conveys no title.<sup>18</sup> The regularity of a sheriff's deed will, however, be presumed.<sup>19</sup>

1 See *Duvall v. Waters*, 1 Bland Ch. 569, 18 Am. Dec. 350; *Jones v. Jones*, 1 Bland Ch. 443, 18 Am. Dec. 327; *Bruch v. Lantz*, 2 Rawle, 392, 21 Am. Dec. 458; *Hobart v. Frisbie*, 5 Conn. 592; *Parker v. Rule*, 9 Cranch, 64. See, also, *Williams on Real Property*, 66 et seq.; Stats. 1 & 2 Vict., c. 110; Stats. 2 & 3 Vict., c. 11.

2 *Mitchell v. Kirtland*, 7 Conn. 231.

3 *Cox v. Joiner*, 4 Bibb, 94; *Williams v. Jones*, 1 Bush, 621; *Kintz v. Long*, 30 Pa. St. 501; *Pickering v. Reynolds*, 111 Mass. 83; *Emmons v. Williams*, 28 Tex. 776; *Dickerman v. Burgess*, 20 Ill. 266; *Dehaven's Appeal*, 75 Pa. St. 237; *Tyler v. Wilkerson*, 27 Ind. 450.

4. See 4 Kent's Commentaries, 429 et seq.; 1 Greenleaf's Cruise on Real Property, 539, note.

5 Jackson v. Woodman, 29 Me. 266; Avery v. Bowman, 39 N. H. 392; Sleeper v. Newbury Seminary, 19 Vt. 451; Litchfield v. Cudworth, 15 Pick. 28; Bissell v. Mooney, 33 Conn. 411; Wilcox v. Emerson, 10 R. I. 270, 14 Am. Rep. 683.

6 4 Kent's Commentaries, 430; and see Garnet v. Macon, 6 Call, 608; Hawley v. James, 5 Paige, 317; Murdock v. Hunter, 1 Brock. 135.

7 Frakes v. Brown, 2 Blackf. 295; and see Spencer v. Champion, 13 Conn. 11.

8 Doe v. Snyder, 3 How. (Miss.) 66.

9 Jackson v. Cadwell, 1 Cow. 622. See Sweeney v. Craddocks, 6 B. Mon. 590.

10 Feger v. Keefer, 6 Watts, 297. Contra, Delano v. Wilde, 11 Gray, 17, 71 Am. Dec. 687. A purchaser of property who takes title under a decree or judgment of a court that was without jurisdiction to grant it acquires no title, and any party having a valid title, but out of possession, may bring ejectment: Weidersum v. Nauman, 62 How. Pr. 369.

11 Saunders v. Pate, 4 Rand. 8; Hand v. Grant, 10 Smedes & M. 514; Neal v. Gillaspy, 56 Ind. 451, 26 Am. Rep. 37; Lang v. Waring, 25 Ala. 625; Roberts v. Hughes, 81 Ill. 130, 25 Am. Rep. 270; Wood v. Lewis, 14 Pa. St. 9. The purchaser must accept the debtor's position as to liabilities, legal or equitable, existing either as encumbrances or as incidents of the title: Bryan v. Sharp, 4 Cal. 349; Carew v. Love, 30 Ala. 577; Polhemus v. Empson, 27 N. J. Eq. 190; Morton v. Welborn, 21 Tex. 772; Frost v. Yonkers Sav. Bank, 70 N. Y. 553, 26 Am. Rep. 627.

12 See Hawley v. Cramer, 4 Cow. 717; Harrison v. Kramer, 3 Iowa, 543; Anthony v. Wessel, 9 Cal. 103.

13 Simonds v. Catlin, 2 Caines, 61; Young v. Withers, 8 Dana, 165; and see Allen v. Moss, 27 Mo. 354.

14 Hadden v. Johnson, 7 Ind. 394; Hart v. Rector, 13 Mo. 497; Boring v. Lemmon, 5 Har. & J. 223; Elfe v. Gadsden, 2 Rich. 373; and see Moorhead v. Pearce, 2 Yeates, 456. In New York, no title will pass to a purchaser of lands at sheriff's sale, unless some deed

or memorandum thereof signed by the sheriff is given: Jackson v. Catlin, 2 Johns. 248.

15 People v. Irvin, 14 Cal. 428.

16 Hagerman v. Jackson, 1 Wend. 502; Kidder v. Orcutt, 40 Me. 589; Bowman v. People, 82 Ill. 246; Hinsdale v. Thornton, 74 N. C. 167. But compare Morrison v. Wurtz, 7 Watts, 437; Stump v. Henry, 6 Md. 209.

17 Gorham v. Wing, 10 Mich. 486; Bernal v. Gleim, 33 Cal. 668. A purchaser of land at a sheriff's sale upon execution takes such an estate therein as the debtor had at the time of sale, and none other: Scott v. Purcell, 7 Blackf. 66; Hildreth v. Sands, 2 Johns. Ch. 35. See, also, Cotton v. Carlisle, 85 Ala. 175, 7 Am. St. Rep. 29; Greer v. Wintersmith, 85 Ky. 516, 7 Am. St. Rep. 613; Zabriskie v. Mead, 2 Nev. 285, 90 Am. Dec. 542. In order to perfect his title, he must pay off all prior liens of every kind: Isler v. Colgrove, 75 N. C. 334; and see Pindall v. Trevor, 30 Ark. 249; Polhemus v. Empson, 27 N. J. Eq. 190.

18 Childers v. Schantz, 120 Mo. 305.

19 Smith v. Crosby, 86 Tex. 15, 40 Am. St. Rep. 818; Caswell v. Jones, 65 Vt. 457, 36 Am. St. Rep. 879; Childs v. McChesney, 20 Iowa, 431, 89 Am. Dec. 545.

## § 261. Tax Deed.

Another statutory mode of divesting the title of one owner of lands, and creating a title to the same lands in another, is by a sale of the lands for the payment of taxes, by some officer duly authorized.<sup>1</sup> But the power to sell land for taxes is a mere naked one, not coupled with an interest, and the law requires that every prerequisite to the exercise of that power must precede its exercise;<sup>2</sup> the agent must strictly pursue the power, or his act will not be sustained by it.<sup>3</sup> And the party claiming title under the power is charge-

able with notice of every irregularity in the proceedings of the officers, and the burden is upon him to show the faithful execution of the power.<sup>4</sup> He must establish affirmatively that the officers acted strictly in conformity with the law;<sup>5</sup> and the proof must be made aliunde, and not by the deed itself.<sup>6</sup> Neither the deed nor its recitals are even prima facie evidence of compliance with the statutory requisites.<sup>7</sup> But in many of the states, the stringency of the common law in this respect has been relaxed by statute, so far as to make tax deeds prima facie evidence of the regularity of the preliminary proceedings, as well as of the sale itself.<sup>8</sup> The statute raises a presumption in favor of the validity of the proceedings, and shifts the burden of proof to the party contesting the sale.<sup>9</sup> But this presumption does not affect in the least the substantial rights of the parties, and a tax deed with a prima facie presumption of validity in its favor is no better when proved to be void than a tax deed that has no such presumption in its favor.<sup>10</sup> And an act of the legislature, declaring a tax deed conclusive evidence that all of the essential requirements of the law regulating the exercise of the taxing power were complied with, is held to be unconstitutional;<sup>11</sup> but it is otherwise of an act which declares the deed conclusive evidence of the regularity of the sale only.<sup>12</sup> If land not taxable is levied upon and sold for taxes, the tax deed is

absolutely void,<sup>13</sup> and the statute of limitations does not run in favor of the holder of the deed from the date thereof, and against the original owner of the land or his grantee.<sup>14</sup> But where the officer gives an imperfect or informal tax deed, which does not pass the title, he may, on his own motion, give a second deed, correct in fact and regular in form.<sup>15</sup> A person in the actual possession of land, and whose legal duty it is to pay the taxes thereon, cannot acquire a tax title, growing out of his own neglect of duty.<sup>16</sup> But this rule does not apply to a purchaser at an execution sale under a judgment for taxes, where such purchaser did not take actual possession.<sup>17</sup>

1 See *Atkins v. Kinnan*, 20 Wend. 249; *Boardman v. Bourne*, 20 Iowa, 134; *Polk v. Rose*, 25 Md. 153; *Stierlin v. Daley*, 37 Mo. 483; *Colman v. Anderson*, 10 Mass. 105; *Corwin v. Merritt*, 3 Barb. 343; *People v. Mayor etc.*, 4 N. Y. 424.

2 *Jackson v. Shepard*, 7 Cow. 68, 17 Am. Dec. 502; *Ronkendorff v. Taylor*, 4 Pet. 349; *Williams v. Peyton*, 4 Wheat. 77; *Scales v. Alvis*, 12 Ala. 617; *Harrington v. Worcester*, 6 Allen, 576.

3 *Jackson v. Shepard*, 7 Cow. 88, 17 Am. Dec. 502; *Sampson v. Marr*, 7 Baxt. 486. A tax collector's deed based upon an invalid sale passes no title: *Forster v. Forster*, 129 Mass. 559.

4 *Norris v. Russell*, 5 Cal. 249; *Bush v. Davison*, 16 Wend. 550; *Sharp v. Speir*, 4 Hill, 86; *Polk v. Rose*, 25 Md. 153; *Denning v. Smith*, 3 Johns. Ch. 344; *Sutton v. Calhoun*, 14 La. Ann. 209; *Langdon v. Poor*, 20 Vt. 15.

5 *Polk v. Rose*, 25 Md. 153; *Thatcher v. Powell*, 6 Wheat. 119; *Jackson v. Esty*, 7 Wend. 148; *Ferris v. Coover*, 10 Cal. 589; *Worthing v. Webster*, 45 Me. 270.

If land be sold for taxes, a part of which are valid and a part illegal, the whole sale and the tax deed will be void: *Wills v. Austin*, 53 Cal. 152.

6 *Jackson v. Shepard*, 7 Cow. 88, 17 Am. Dec. 502; *Jesse v. Preston*, 5 Gratt. 120; *Jackson v. Roberts*, 11 Wend. 432; *Phillips v. Sherman*, 61 Me. 548; *Reed v. Field*, 15 Vt. 672.

7 *Brown v. Wright*, 17 Vt. 97; *Hill v. Draper*, 10 Barb. 463; *Shearer v. Corbin*, 1 McCrary, 306; *Hoyt v. Dillon*, 19 Barb. 644; *Jackson v. Shepard*, 7 Cow. 88, 17 Am. Dec. 502; *Weyand v. Tipton*, 5 Serg. & R. 332; and see *McAllister v. Shaw*, 69 Me. 348. But compare *Currie v. Fowler*, 5 J. J. Marsh. 145; *Allen v. Robinson*, 3 Bibb. 326.

8 *Ferris v. Coover*, 10 Cal. 589; *Person v. O'Neal*, 32 La. Ann. 228; *O'Grady v. Barnishel*, 23 Cal. 287; *Madland v. Benland*, 24 Minn. 372; *Johnson v. Elwood*, 53 N. Y. 431; *Stewart v. McSweeney*, 14 Wis. 468; *Hart v. Smith*, 44 Wis. 213; *Bowman v. Cockrill*, 6 Kan. 311; *Gardenhire v. Mitchell*, 21 Kan. 83; *Stanberry v. Sillon*, 13 Ohio St. 571; *State v. Herron*, 29 La. Ann. 848; *Lee v. Jeddo Coal Co.*, 84 Pa. St. 74; and see *Steeple v. Downing*, 60 Ind. 478.

9 *Taylor v. Miles*, 5 Kan. 498, 7 Am. Rep. 558; *Johnson v. Elwood*, 53 N. Y. 431; *Biscoe v. Coalter*, 18 Ark. 423; *Williams v. Kirkland*, 13 Wall. 306; and see *Easton v. Savery*, 44 Iowa, 654; *Daniels v. Burso*, 40 Ill. 307; *Davis v. Hall*, 92 Ill. 85; *Taylor v. Hamilton*, 173 Ill. 392.

10 *Taylor v. Miles*, 5 Kan. 498, 7 Am. Rep. 558.

11 *McCready v. Sexton*, 29 Iowa, 356, 4 Am. Rep. 214; *Gould v. Thompson*, 45 Iowa, 450; *Abbott v. Lindenbower*, 42 Mo. 162; 46 Mo. 291; *Quinlon v. Rogers*, 12 Mich. 168; *Curry v. Hinman*, 11 Ill. 428; *People v. Mitchell*, 45 Barb. 212.

12 *Martin v. Cole*, 38 Iowa, 141; *Stead v. Cource*, 4 Cranch, 303; *Callanan v. Hurley*, 93 U. S. 387; *Doughty v. Hope*, 1 N. Y. 79; 3 Denio, 595.

13 *Taylor v. Miles*, 5 Kan. 498, 7 Am. Rep. 558.

14 *Taylor v. Miles*, 5 Kan. 498, 7 Am. Rep. 558; and see *Lain v. Shepardson*, 18 Wis. 59; *Moore v. Brown*, 11 How. 414; *Leffingwell v. Warren*, 2 Black, 599.

15 *McCready v. Sexton*, 29 Iowa, 356, 4 Am. Rep. 214; *Woodman v. Clapp*, 21 Wis. 350; 21 Wis. 355; *Maxcy v. Clabaugh*, 1 Gilm. 26; and see *Gibson v. Bailey*, 9 N. H. 168; *Thomas v. Kennedy*, 24 Iowa, 397. Titles to a vast amount of real property in many of the states rest upon sales of executors and administrators under the order of a court: See *Watkins v. Holman*, 16 Pet. 62.

16 *Pickering v. Lomax*, 120 Ill. 289; and see *Burns v. Lewis*, 86 Ga. 604; *Keil v. West*, 21 Fla. 527; *Seaver v. Cobb*, 98 Ill. 200; *Battin v. Woods*, 27 W. Va. 67.

17 *Childers v. Schantz*, 120 Mo. 305.



## CHAPTER XXIV.

## DESCENT.

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## § 262. Definition of Title by.

Title by descent or hereditary succession is a title acquired by act or operation of law, as contradistinguished from title by purchase, or by the act or agreement of the parties.<sup>1</sup> It is the title whereby a man, on the death of his ancestor, acquires his estate by right of representation as his heir at law;<sup>2</sup> and such estate is called an inherit-

ance.<sup>3</sup> The law itself casts the estate upon the heir immediately on the death of the ancestor, and he cannot disclaim it, even if he would.<sup>4</sup> If the estate is not devised to some other person, although the intention be ever so manifest to disinherit the heir, the law still casts the estate upon him.<sup>5</sup> In cases of doubt, the heir is to be preferred.<sup>6</sup> Title by descent is not derived from natural law, and all statutes regulating the subject may be considered as positive, and in some degree arbitrary, rules.<sup>7</sup> An heir at law may release to his father, for a sufficient consideration, all the share which he would otherwise acquire in the latter's estate on his death, and he will be thereby estopped from claiming any interest therein as one of the heirs at law of his father.<sup>8</sup> But such release is subject to the statute of frauds, and must be in writing.<sup>9</sup>

1 See sec. 246, ante; *O'Byrne v. Feeley*, 61 Ga. 82; *Dove v. Torr*, 128 Mass. 40; *Donahue's Estate*, 36 Cal. 329; *Chapman v. Hollister*, 42 Cal. 463.

2 2 Blackstone's Commentaries, 201; 4 Kent's Commentaries, 374; *Female Academy v. Sullivan*, 116 Ill. 390, 56 Am. Rep. 776; *Heidenheimer v. Bauman*, 84 Tex. 174, 31 Am. St. Rep. 29. The heir is not to be disinherited by anything less than a clearly apparent intention to pass the estate in another line of succession: *Cowles v. Cowles*, 53 Pa. St. 175.

3 2 Blackstone's Commentaries, 201; 2 Greenleaf's *Cruise on Real Property*, 135; and see *McMakin v. Michaels*, 23 Ind. 462; *Mace v. Cushman*, 45 Me. 250.

4 2 Blackstone's Commentaries, 201; *Smith v. Smith*, 23 Ind. 202; *Burney v. Wilson*, 11 Ohio St. 426; *Powers v. Morrison*, 88 Tex. 133, 53 Am. St. Rep. 738; *Overturf v. Dugan*, 29 Ohio St. 220; *Johnson v. Colby*, 52

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Neb. 327; and see *Baxter v. Bradbury*, 27 Me. 260; *Bates v. Howard*, 105 Cal. 173, 183.

5 *Gage v. Gage*, 29 N. H. 533; *McIntire v. Cross*, 3 Ind. 444; *Haxtun v. Corse*, 2 Barb. Ch. 506; *Wright v. Hicks*, 12 Ga. 155.

6 *Walker v. Walker*, 28 Pa. St. 40; and see *Buckley v. Buckley*, 11 Barb. 43; *Gilpin v. Hollingsworth*, 3 Md. 190.

7 *Haven v. Foster*, 9 Pick. 127. See *Davis v. Stinson*, 53 Me. 493; *Cannon v. Nowell*, 6 Jones L. 436.

8 *Brands v. De Witt*, 44 N. J. Eq. 545, 6 Am. St. Rep. 909.

9 *Green v. Hathaway*, 36 N. J. Eq. 471.

### § 263. What Descends to Heir.

Not only every freehold interest in land, but also heirlooms,<sup>1</sup> and all such chattels as are annexed to or connected with the freehold, descend to the heir.<sup>2</sup> As between heir and executor, the rule of succession obtains with the most rigor in favor of the inheritance.<sup>3</sup> Standing trees and growing grass descend to the heir.<sup>4</sup> An interest in a contract for the purchase of land is real estate, and descends to the heirs of the purchaser.<sup>5</sup> But where a contract for the sale of land is void, or cannot be enforced by reason of laches in the purchaser, on the death of the vendor the land descends to his heirs.<sup>6</sup> Where, under a grant made by Congress, a person was entitled to certain land, but died before a patent was issued, it was held that the property descended to his heirs.<sup>7</sup> So lands purchased by the intestate at a tax sale descend to his heir, though a deed has not been made to the ancestors.<sup>8</sup> So a survey of

lands, preliminary to a purchase from a state, but not perfected by grant, is a descendible interest.<sup>9</sup> Rent accruing out of land, upon a lease granted by the owner in fee, and which does not become due till after the death of the lessor, is a chattel real, which descends to the heir as part of the inheritance.<sup>10</sup> When the relation of trustee and cestui que trust exists, on the death of the trustee nothing but the mere legal estate descends to his heirs.<sup>11</sup> If the trustee, in violation of his trust, buys land with the money of the cestui que trust, and takes the conveyance to himself, the estate descends to the heirs at law of the cestui que trust.<sup>12</sup>

1 See sec. 3, ante.

2 See sec. 9, ante; *Walker v. Sherman*, 20 Wend. 646.

3 *House v. House*, 10 Paige, 158; *Buckley v. Buckley*, 11 Barb. 43; *O'Dougherty v. Felt*, 65 Barb. 225.

4 *Bank of Lansingburgh v. Crary*, 1 Barb. 542; *Warren v. Leland*, 2 Barb. 613; sec. 5, ante. And see *Foster v. Gorton*, 5 Pick. 185.

5 *Griffith v. Beecher*, 10 Barb. 432; *Moore v. Burrows*, 34 Barb. 173; *Knolls v. Barnhart*, 9 Hun, 443; *Pelton v. Fire Ins. Co.*, 77 N. Y. 607.

6 *McKay v. Carrington*, 1 McLean, 53; and see *Flanders v. Davis*, 19 N. H. 139; *Stump v. Gaby*, 117 Eng. L. & Eq. 357.

7 *Forsythe v. Ballance*, 6 McLean, 562; and see *Gilpin v. Hollingsworth*, 3 Md. Ch. 190; *Frizzle v. Veach*, 1 Dana, 211.

8 *Rice v. White*, 8 Ham. 216; and see *Kline v. Bowman*, 19 Pa. St. 24; *Dalrymple v. Taneyhill*, 4 Md. Ch. 171.

9 *Hansford v. Minor*, 4 Bibb, 385. A contingent interest is descendible: *Clapp v. Stoughton*, 10 Pick. 463.

An equity of redemption is real estate, and descends to the heir of the mortgagor: *Asay v. Hoover*, 5 Pa. St. 21, 45 Am. Dec. 713; and see *Roosevelt v. Fulton*, 7 Cow. 71.

10 *Green v. Massie*, 13 Ill. 363.

11 *Walton v. Coulson*, 1 McLean, 132; *Martin v. Price*, 2 Rich. Eq. 412.

12 *Reid v. Finch*, 11 Barb. 399; and see *Asay v. Hoover*, 5 Pa. St. 21, 45 Am. Dec. 713; *Lindsay v. Pleasants*, 4 Ired. Eq. 320. Where there has been a conversion of land into money for a specific purpose, upon its attainment the proceeds descend as money, and not as land: *Large's Appeal*, 54 Pa. St. 383.

### § 264. Who may be Heirs.

By the common law of England, persons who are capable of claiming an estate by way of inheritance must be: 1. Legitimate, that is, begotten or born in lawful wedlock;<sup>1</sup> 2. They must be either natural born citizens, or have been duly naturalized;<sup>2</sup> 3. They must not have been attainted of treason or felony, or claim through any ancestor who was so attainted.<sup>3</sup> These several heads and their statutory modifications will be more fully considered in subsequent sections.<sup>4</sup> Heirs are the persons in whom real estate vests by operation of law, on the death of the one who was last seised. This law varies in different countries, in the same country at different periods, and in the same country in relation to different estates.<sup>5</sup> The word "heirs," in its strict and primary meaning, signifies those entitled by law to inherit by descent the real estate of a deceased person.<sup>6</sup>

1 Coke on Littleton, 7b; Doe v. Vardill, 5 Barn. & C. 438; 6 Bing. N. C. 385; Bollerman v. Blake, 11 N. Y. Week. Dig. 555; Doe v. Bates, 6 Blackf. 533; Cooley v. Dewey, 4 Pick. 93, 16 Am. Dec. 326; Stover v. Boswell, 3 Dana, 233; Kirkpatrick v. Rogers, 6 Ired. Eq. 130; Miller v. Miller, 18 Hun, 507.

2 Doe v. Jones, 4 Term Rep. 300; Jackson v. Beach, 1 Johns. Cas. 399; and see Holliman v. Peebles, 1 Tex. 673; Munroe v. Merchant, 29 N. Y. 9.

3 See 2 Greenleaf's Cruise on Real Property, 145; sec. 255, ante.

4 Secs. 267, 269, 270, post.

5 Dukes v. Falk, 37 S. C. 255, 34 Am. St. Rep. 745; Templeton v. Walker, 3 Rich. Eq. 550, 55 Am. Dec. 646.

6 Ruggles v. Randall, 70 Conn. 44, 48.

## § 265. Consanguinity, or Kindred.

The common-law doctrine of inheritance depends on the nature of kindred, and the several degrees of consanguinity.<sup>1</sup> And consanguinity, or kindred, is defined to be the connection or relation of persons descended from the same stock or common ancestor,<sup>2</sup> who is the stirps or root from whom the line of descent is traced.<sup>3</sup> Consanguinity is either lineal or collateral.<sup>4</sup> The former subsists between persons of whom one is descended in a direct line from the other, such as father and son;<sup>5</sup> the latter subsists between persons lineally descended from the same common ancestor or stirps, but not one from the other.<sup>6</sup> Thus, an uncle and nephew are collaterally related, since each may trace his line of descent to the same common ancestor.<sup>7</sup> The mode of computing the degrees of consanguinity by the canon and common law is to begin at the common an-

cestor and reckon downward, and in whatever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree in which they are said to be related.<sup>8</sup> Thus, two brothers are related in the first degree, because from the father to either of them is but a single step; but an uncle and nephew are related in the second degree, because the latter is two degrees removed from the common ancestor.<sup>9</sup> By the rule of the civil law, which rule has been generally adopted in the United States, the degrees of consanguinity are computed "by adding together the number of degrees there are between each of the two persons whose relationship is to be ascertained and the common ancestor";<sup>10</sup> and according to this rule, brothers are related in the second, uncle and nephew in the third, and cousins in the fourth degree of kindred.<sup>11</sup>

1 2 Blackstone's Commentaries, 202.

2 2 Blackstone's Commentaries, 202; 2 Greenleaf's Cruise on Real Property, 137; Sweezey v. Willis, 1 Bradf. 495.

3 2 Blackstone's Commentaries, 204; 2 Washburn on Real Property, \*405.

4 2 Blackstone's Commentaries, 202.

5 2 Blackstone's Commentaries, 203.

6 2 Blackstone's Commentaries, 204; 2 Washburn on Real Property, 405, 406; McDowell v. Adams, 45 Pa. St. 430.

7 2 Washburn on Real Property, 406.

8 Coke on Littleton, 23; 2 Blackstone's Commentaries, 206; 2 Greenleaf's Cruise on Real Property, 137, 138; 4 Kent's Commentaries, 413.

9 2 Blackstone's Commentaries, 206, \*207.

10 2 Washburn on Real Property, 406; and see *Cloud v. Puce*, 61 Ind. 171; *Bruce v. Bissell*, 119 Ind. 525, 12 Am. St. Rep. 436. The civil-law rule of computation of degrees of kindred is the law in all the states of the Union except North Carolina: *Clayton v. Drake*, 17 Ohio St. 367.

11 2 Washburn on Real Property, \*406; 4 Kent's Commentaries, 412, 413.

### § 266. What Law Controls.

When lands are claimed by descent, the capacity to take must have existed in the heir at the moment of the death of the ancestor;<sup>1</sup> and such capacity, as well as the right of the state, in the event of there being no person to inherit, must depend upon the law in force at the time of the ancestor's death.<sup>2</sup> And although the capacity to take may be enlarged by subsequent laws, yet such laws cannot operate retrospectively to divest an estate in lands which then vested in the state.<sup>3</sup> And lands are to descend according to the laws of the state in which they are situated, irrespective of the domicile of the person dying intestate, or of those claiming as heirs.<sup>4</sup>

1 *Donovan v. Pitcher*, 53 Ala. 411, 25 Am. Rep. 634; and see *People v. Conklin*, 2 Hill, 67; *Dawson v. Godfrey*, 4 Cranch, 322; *Anson v. Stein*, 6 Clarke, 150.

2 *White v. White*, 2 Met. (Ky.) 185; *Lee v. Smith*, 18 Tex. 141; *McGaughey v. Henry*, 15 B. Mon. 383; *Miller v. Miller*, 10 Met. 401; *Marshall v. King*, 24 Miss. 85; *Wunderle v. Wunderle*, 144 Ill. 40.

3 *Donovan v. Pitcher*, 53 Ala. 411, 25 Am. Rep. 634.

4 *Potter v. Titcomb*, 29 Me. 300; and see *Smith v. Kelly*, 23 Miss. 167; *Smith v. Derr*, 34 Pa. St. 126, 75



Am. Dec. 641; *Bollerman v. Blake*, 24 Hun, 187; 11 N. Y. Week. Dig. 555; *Bryan v. Moore*, 11 Mart. (La.) 26, 13 Am. Dec. 347; *Abston v. Abston*, 15 La. Ann. 137; *Williams v. Kimball*, 35 Fla. 49, 48 Am. St. Rep. 238, all to same effect.

### § 267. Illegitimate Children.

Illegitimate children, or bastards, are not capable of being heirs by the common law.<sup>1</sup> And as bastards cannot be heirs themselves, neither can they have any heirs except those of their own bodies.<sup>2</sup> But the illegitimacy of a married woman's child can in general be inferred only from the impossibility of the husband's access.<sup>3</sup> The rule of the common law which excludes children and relatives who are illegitimate from the inheritance has been modified by statute in nearly all the states, and especially to the extent of providing that, as between mothers and their illegitimate children, the latter can inherit from and transmit to the former real and personal estates.<sup>4</sup> In some of the states bastards may be rendered legitimate by the subsequent intermarriage of their parents;<sup>5</sup> in others, by a deed or writing executed by the father, distinctly acknowledging the paternity of the child, and attested by a competent witness.<sup>6</sup> Children born before marriage, though by the laws of the country in which they are born the subsequent marriage of their parents may render them legitimate, are not capable of inheriting land in England.<sup>7</sup> And it is held in Pennsylvania that a child born out of wedlock, and made legitimate by

the laws of another state, is not thereby rendered capable of inheriting land in the former state.<sup>8</sup> So, in New York, the common-law rule, that in respect to descent the personal status of legitimacy acquired under foreign law does not confer the right of inheritance of real property, still obtains.<sup>9</sup>

1 Sec. 264, ante; *Pratt v. Atwood*, 108 Mass. 40; *Barwick v. Miller*, 4 Desaus. Eq. 434; *Sneed v. Ewing*, 5 J. J. Marsh. 460, 22 Am. Dec. 41; *Cooley v. Dewey*, 4 Pick. 93, 16 Am. Dec. 326; *Blacklaws v. Milne*, 82 Ill. 505, 25 Am. Rep. 339.

2 In re *Wilcox Settlement*, L. R. 1 Ch. Div. 229; *McGunnigle v. McKee*, 77 Pa. St. 81, 18 Am. Rep. 428. The maxim of the common law, that a bastard is *nulius filius*, is entirely rejected in Connecticut, and such a child is there recognized by law as the child of its mother with all the rights and duties of a child: *New Haven v. Newton*, 12 Conn. 165; *Bethlehem v. Roxbury*, 20 Conn. 340; *New Haven v. Huntington*, 22 Conn. 25; *Dickinson's Appeal*, 42 Conn. 491, 19 Am. Rep. 553.

3 *Head v. Head*, 1 Turn. 138; 1 Sim. & St. 150; *Goodright v. Saul*, 4 Term Rep. 356; *Stegall v. Stegail*, 2 Brock. 256; *Commonwealth v. Shepherd*, 6 Binn. 283; 6 Am. Dec. 449; *Cannon v. Cannon*, 7 Humph. 410; *Cross v. Cross*, 3 Paige, 139, 23 Am. Dec. 778.

4 See 4 Kent's Commentaries, 413 et seq.; *Orthwein v. Thomas*, 127 Ill. 554, 11 Am. St. Rep. 159; *Brewer v. Blougher*, 14 Pet. 178; *McGuire v. Brown*, 41 Iowa, 650; *Haraden v. Larrabee*, 113 Mass. 430; *Dickinson's Appeal*, 42 Conn. 491, 19 Am. Rep. 556. Legislative power to legitimate a bastard child has long been recognized, both in England and in this country: *McGunnigle v. McKee*, 77 Pa. St. 81, 18 Am. Rep. 430; *Miller's Appeal*, 52 Pa. St. 113; *Brewer v. Blougher*, 14 Pet. 178; *Dyer v. Brannock*, 66 Mo. 391; *Beall v. Beall*, 8 Ga. 210; *Moore v. Moore*, 35 Vt. 98; *Shelton v. Wright*, 25 Ga. 636; *Cope v. Cope*, 137 U. S. 682. In Kentucky, a bastard cannot inherit from his mother's ancestors: *Jackson v. Jackson*, 78 Ky. 390, 39 Am. Rep. 246. But bastards of the same mother may inherit and transmit an

inheritance on the part of each other, as if born in lawful wedlock of the same parents: *Sutton v. Sutton*, 87 Ky. 216, 12 Am. St. Rep. 476.

5 See *Hunter v. Whitworth*, 9 Ala. 965; *Dickinson's Appeal*, 42 Conn. 491, 19 Am. Rep. 556.

6 See *Hunt v. Hunt*, 37 Me. 333. Connecticut has passed no statute defining the rights of bastards, and in that state a bastard has inheritable blood for the purpose of collateral as well as lineal descent through him: *Dickinson's Appeal*, 42 Conn. 491, 19 Am. Rep. 556. Thus, the estate of A is held to be inheritable by B, as heir at law, through C, his grandmother, a sister of A, and D his mother, the illegitimate daughter of C, *Dickinson's Appeal*, 42 Conn. 491, 19 Am. Rep. 556; and see *Canaan v. Salisbury*, 1 Root, 155; *New Haven v. Huntington*, 22 Conn. 25. In a few of the states it is held that, independently of statute, one illegitimate child may inherit to another of the same mother: *Burlington v. Fosby*, 6 Vt. 83, 27 Am. Dec. 535; *Brown v. Dye*, 2 Root, 280; *Heath v. White*, 5 Conn. 228; *Flintham v. Holder*, 1 Dev. & B. 346. Compare *Bacon v. McBride*, 32 Vt. 585; *Lewis v. Eutler*, 4 Ohio St. 354.

7 *Doe v. Vardill*, 5 Barn. & C. 438.

8 *Smith v. Derr*, 34 Pa. St. 126, 75 Am. Dec. 641.

9 *Bollerman v. Blake* (1881), 11 N. Y. Week. Dig. 555; and see to same effect, *Williams v. Kimball*, 35 Fla. 49, 48 Am. St. Rep. 238; *Succession of Petit*, 49 La. Ann. 625, 62 Am. St. Rep. 659; *Donovan v. Pitcher*, 53 Ala. 411, 25 Am. Rep. 634.

### § 267a. Adopted Children.

Under adoption statutes in the several states, the husband or wife, or both, may adopt a child as his, her, or their heir, and the adopted child will inherit the same as if born of such adopting parents in lawful wedlock. For all purposes of inheritance from the adopting parent, the adopted child becomes and is the lawful child of such adopting parent.<sup>1</sup> At the same time the adopted

child remains the child of its natural parents, and is not deprived of its rights of inheritance from them, unless expressly so provided by statute.<sup>2</sup> But the right to inherit by virtue of a deed of adoption does not make the beneficiary a "bodily heir," or child in fact of the adopting parent;<sup>3</sup> hence, a conveyance to A B and his bodily heirs cannot, upon the death of A B, vest any estate in his adopted child.<sup>4</sup> Nor can an adopted child take by descent from the lineal and collateral kindred of the adopting parent.<sup>5</sup>

1 *Moran v. Stewart*, 122 Mo. 295; *Van Matre v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196, and note.

2 *Wagner v. Varner*, 50 Iowa, 532; *Clarkson v. Hatton*, 143 Mo. 47, 65 Am. St. Rep. 635.

3 See *Schafer v. Eneu*, 54 Pa. St. 304.

4 *Clarkson v. Hatton*, 143 Mo. 47, 65 Am. St. Rep. 635.

5 *Keegan v. Geraghty*, 101 Ill. 26.

## § 268. Posthumous Children.

Posthumous children inherit in all cases, and in the same manner, as if they had been born in the lifetime of the father, and had survived him.<sup>1</sup> For the purposes of heirship a child in ventre sa mere is considered as absolutely born.<sup>2</sup>

1 *Den v. Flora*, 8 Ired. 374; 4 Kent's Commentaries, 412; *Doe v. Clark*, 2 H. Black. 299; and see *Botsford v. O'Connor*, 57 Ill. 72.

2 *Hall v. Hancock*, 15 Pick. 255, 26 Am. Dec. 598; *Harper v. Archer*, 4 Smedes & M. 99; *Marsellis v. Thalheimer*, 2 Paige, 35, 21 Am. Dec. 66; *Long v. Blackall*, 7 Term Rep. 100; *Thellusson v. Woodford*, 4 Ves. 322; and see *Foster v. Cook*, 3 Bro. C. C. 347. Where a child

is delivered by the Caesarean operation after its mother's death, the father is not entitled to take by curtesy: *Marsellis v. Thalhimer*, 2 Paige, 35, 21 Am. Dec. 66; *Matter of Winne*, 1 Lans. 513. See sec. 47, ante.

### § 269. Rights of Aliens.

An alien cannot take by descent at common law, and, having no inheritable blood, he cannot transmit an estate by inheritance.<sup>1</sup> But an alien may be naturalized by act of parliament in England, and thereby become as capable of inheriting real property as if he were a natural born subject.<sup>2</sup> And a person duly naturalized according to the provisions of act of Congress (U. S. Rev. Stats., sec. 2172) has the like capacity to take and transmit real property as a native-born citizen.<sup>3</sup> In most of the states, an alien is authorized by statute to hold real estate, and it will descend to whoever is his lawful heir.<sup>4</sup> By statute in some of the states, an alien may take real estate by descent from an alien.<sup>5</sup> A citizen of France can take land in the District of Columbia by descent from a citizen of the United States.<sup>6</sup> The law existing at the time of descent cast governs the right of aliens to inherit realty.<sup>7</sup>

1 *Collingwood v. Pace*, 1 Vent. 413; *Jackson v. Fitzsimmons*, 10 Wend. 9, 24 Am. Dec. 198; *McCarthy v. Marsh*, 5 N. Y. 274; *Vermont v. Boston etc. R. R. Co.*, 25 Vt. 433; *Fairfax v. Hunter*, 7 Cranch, 603; *Gouverneur v. Robertson*, 11 Wheat. 332; *Levy v. McCartee*, 6 Pet. 102; *Cross v. De Valle*, 1 Cliff. 282; *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430.

2 2 Greenleaf's *Cruise on Real Property*, 143. The English statute of 11 & 12 William III, chapter 6,

removed the common-law disability of claiming through an alien ancestor: See *McCreery v. Somerville*, 9 Wheat. 354; *People v. Irvin*, 21 Wend. 128; *McKinney v. Savieo*, 18 How. 235.

3 See *Jackson v. Green*, 7 Wend. 333; *Ritchie v. Putnam*, 13 Wend. 524; *State v. Penney*, 10 Ark. 621.

4 See sec. 19, ante; *Luhrs v. Eimer*, 80 N. Y. 171; *Hall v. Hall*, 81 N. Y. 130; *Farrell v. Enright*, 12 Cal. 450; *Carrasco v. State*, 67 Cal. 386; *Estate of Billings*, 65 Cal. 593; *Jones v. McMasters*, 20 How. 8; *Rubeck v. Gardner*, 7 Watts, 455; *Starks v. Traynor*, 11 Humph. 292; *McColville v. Howell*, 17 Fed. Rep. 104.

5 So in Missouri: *Burke v. Adams*, 80 Mo. 504, 50 Am. Rep. 510; and see *Hannon v. Hannihan*, 85 Va. 429.

6 *Geofroy v. Riggs*, 133 U. S. 258.

7 *Pilla v. German School Assn.*, 23 Fed. Rep. 700.

## § 270. Attainder.

By the English law, persons attainted of high treason or felony are incapable of taking lands by descent or of transmitting them to their heirs.<sup>1</sup> A person may, however, inherit from one of his parents, though the other was attainted of treason or felony.<sup>2</sup> Attainders of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted, to the disinherison of his heirs, or of those who would otherwise be his heirs.<sup>3</sup> This was felt to be a great hardship and injustice to innocent children, and when the federal constitution was framed, it was ordained that no attainder of treason should work corruption of blood or forfeiture except during the life of the person attainted.<sup>4</sup> And under the act of Congress of July 17, 1862 (12 Statutes at Large, 589), known as the confiscation act, and the joint

resolution of the same date explanatory of it, only the life estate of the person for whose offense the land has been seised is subject to condemnation and sale.<sup>5</sup> But when the provisions of the act have been carried into effect by appropriate proceedings in any given case, the offender has no longer any interest or ownership in the thing forfeited which he can convey, or any power over it which he can exercise in favor of another.<sup>6</sup> After his death, the land shall pass and be owned as if it had not been forfeited.<sup>7</sup> It has been held that an heir or donee who has murdered his ancestor or testator in order to obtain the latter's property will not be permitted to have any benefit as such heir or donee.<sup>8</sup> On the other hand, it is held that a son who has murdered his father for the purpose of securing his father's estate is nevertheless entitled to take the estate under the intestate laws, and that his crime does not destroy his right of inheritance.<sup>9</sup>

1 2 Greenleaf's Cruise on Real Property, 145; Coke on Littleton, 391; 2 Blackstone's Commentaries, 251; Burton on Real Property, sec. 329.

2 2 Greenleaf's Cruise on Real Property, 245.

3 2 Blackstone's Commentaries, 253, 254; and see Wallach v. Van Riswick, 92 U. S. 202.

4 U. S. Const., art. 3, sec. 3.

5 Day v. Micon, 18 Wall. 156.

6 Wallach v. Van Riswick, 92 U. S. 202; and see Semmes v. United States, 91 U. S. 21.

7 Wallach v. Van Riswick, 92 U. S. 202. Compare Moore v. Littel, 41 N. Y. 78; Higginson v. Mein, 4

Cranch, 415; McGregor v. Comstock, 17 N. Y. 164; Gilbert v. Bell, 15 Mass. 44.

8 Riggs v. Palmer, 115 N. Y. 506, 12 Am. St. Rep. 819.

9 Carpenter's Appeal, 170 Pa. St. 203, 50 Am. St. Rep. 765; and so, to same effect, Owens v. Owens, 100 N. C. 242; Shellenberger v. Ransom, 41 Neb. 631, disapproving Shellenberger v. Ransom, 31 Neb. 61, 28 Am. St. Rep. 500.

### § 271. - Seisin of Ancestor.

It is a maxim of the common law that non jus sed seisin facit stipitem.<sup>1</sup> Actual seisin, or seisin in deed,<sup>2</sup> was necessary to make any person the stirps or stock from which all future inheritance, by right of blood, must be derived.<sup>3</sup> If he had a seisin in law only, it was not deemed sufficient.<sup>4</sup> Even where a rent descended to a person, it was necessary actually to receive the rent before he could become the stock of a descent.<sup>5</sup> It followed from this doctrine that if the heir on whom the inheritance had been cast died before acquiring the requisite seisin, his ancestor, and not himself, was the person last seised, and the one to whom the claimants must make themselves heirs.<sup>6</sup> An exception to the rule was where an ancestor acquired an estate by purchase, he was in some cases allowed to transmit it to his heirs, though he never had actual seisin of it himself.<sup>7</sup> So in case of an exchange of lands, if one of the parties had entered, and the other died before entry, his heir would take by descent.<sup>8</sup> And equitable interests in lands may be transmitted to the heir,



by an ancestor who never had obtained any kind of seisin or possession.<sup>9</sup> In this country, generally speaking, the maxim, *Seisina facit stipitem*, has either never been adopted,<sup>10</sup> or has expressly, or by implication, been abrogated;<sup>11</sup> and on the death of the ancestor, the descent is cast upon the heir without any reference to the seisin of such ancestor.<sup>12</sup> The heir takes by descent all the real estate owned by the ancestor at the time of his death;<sup>13</sup> no distinction being made in this respect between estates in possession and in reversion.<sup>14</sup>

1 2 Blackstone's Commentaries, 209; 2 Greenleaf's Cruise on Real Property, 149; 4 Kent's Commentaries, 386.

2 See sec. 20, ante; *Vanderheyden v. Crandall*, 2 Denio, 9.

3 2 Blackstone's Commentaries, 209; 2 Greenleaf's Cruise on Real Property, 149; *Chirac v. Reinecker*, 2 Pet. 625; and see *Jackson v. Hendricks*, 3 Johns. Cas. 214; *Doe v. Keen*, 7 Term Rep. 386.

4 2 Greenleaf's Cruise on Real Property, 149. But this rule was changed by statute 3 & 4 William IV, chapter 106.

5 2 Greenleaf's Cruise on Real Property, 149; Coke on Littleton, 11b.

6 Burton on Real Property, sec. 303; 4 Kent's Commentaries, 386; *Goodtitle v. Newman*, 3 Wils. 516; 1 Sim. & St. 260.

7 *Shelley's Case*, 1 Coke, 98a; Burton on Real Property, sec. 304; 2 Greenleaf's Cruise on Real Property, 149.

8 *Shelley's Case*, 1 Coke, 98a; 4 Kent's Commentaries, 386.

9 *Potter v. Potter*, 1 Ves. Sr. 437; and see *Roup v. Bradner*, 19 Hun, 513.

10 See *Hillhouse v. Chester*, 3 Day, 166, 3 Am. Dec. 265.

11 See *Rush v. Bradley*, 4 Day, 306; *Thompson v. Sandford*, 13 Ga. 238; *Kean v. Hofferker*, 2 Harr. (Del.) 103, 29 Am. Dec. 336; *Moor v. Rake*, 26 N. J. L. 574; *Russell v. Hoar*, 3 Met. 187; *Guion v. Burton*, Meigs. 565; *Chirac v. Reinecker*, 2 Pet. 625; 4 Kent's Commentaries, 388.

12 *Hillhouse v. Chester*, 3 Day, 166, 3 Am. Dec. 265.

13 *Hillhouse v. Chester*, 3 Day, 166, 3 Am. Dec. 265; *Hartley v. State*, 3 Ga. 238; *Cook v. Hammond*, 4 Mason, 484.

14 *Cook v. Hammond*, 4 Mason, 484; 4 Kent's Commentaries, 389. One who has a vested remainder in fee simple, expectant on the determination of a present freehold estate, has such a seisin in law, where the estate was acquired by purchase, as will constitute him a stirps, or stock of descent: *Wendell v. Crandall*, 1 N. Y. 491; *Vanderheyden v. Crandall*, 2 Denio, 9.

## § 272. English Rules of Descent.

The rules or canons of inheritance by which estates are transmitted from the ancestor to the heir, according to the English law, are thus laid down by Sir William Blackstone:<sup>1</sup> 1. Inheritances shall lineally descend to the issue of the person who last died actually seised, in infinitum, but shall never lineally ascend;<sup>2</sup> 2. The male issue shall be admitted as heirs before females;<sup>3</sup> 3. Where there are two or more males, in equal degree, the eldest only shall inherit, but the females altogether;<sup>4</sup> 4. The lineal descendants, in infinitum, of any person deceased shall represent their ancestor, that is, stand in the same place as the person himself would have done had he been living;<sup>5</sup> 5. On failure of lineal descendants, or

issue of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the last three preceding rules;<sup>6</sup> 6. The collateral heir of the person last seised must be his next collateral kinsman of the whole blood;<sup>7</sup> 7. In collateral inheritances the male stocks shall be preferred to the female, unless where the lands have, in fact, descended from a female.<sup>8</sup>

1 2 Blackstone's Commentaries, 208 et seq.; and see 2 Greenleaf's Cruise on Real Property, \*100; Williams on Real Property, 76.

2 2 Blackstone's Commentaries, 208. The law now is, that the descent shall be traced from the last person entitled to the estate as a purchaser: Stat. 3 & 4 Wm. V, c. 106; and see Williams on Real Property, 78. Before the death of the ancestor, the person who is next in the line of succession is called an heir apparent, or an heir presumptive: 2 Blackstone's Commentaries, 208; Anonymous, Lofft. 273.

3 2 Blackstone's Commentaries, 213. See Stat. 3 & 4 Wm. IV, c. 106, sec. 7.

4 2 Blackstone's Commentaries, 214. Daughters take the inheritance as coparceners, and are said to make but one heir: Burton on Real Property, sec. 316.

5 2 Blackstone's Commentaries, 216; Burton on Real Property, 315. This taking by representation is called succession per stirpes, or according to the roots, in distinction from a taking per capita, that is, where each takes next in degree to the ancestor in his own direct right: 2 Blackstone's Commentaries, 217, 218; 2 Washburn on Real Property, 407; 4 Kent's Commentaries, 391, 392; Davis v. Stinson, 53 Me. 493. See Kelly v. Kelly, 5 Lans. 443.

6 2 Blackstone's Commentaries, 220. This rule is altered by statute, and preference is given to lineal ancestors over collateral kindred: Stat. 3 & 4 Wm. IV, c. 106, sec. 6.

7 2 Blackstone's Commentaries, 224. See *Hawkins v. Shewen*, 1 Sim. & St. 257. Relations of the half blood are now capable of inheriting: Stat. 3 & 4 Wm. 4, c. 106, sec. 9. See 2 Greenleaf's Cruise on Real Property, 164, note; Williams on Real Property, \*106.

8 2 Blackstone's Commentaries, 234. Under this rule the relations on the father's side are admitted in infinitum, before those on the mother's side are admitted at all: 2 Blackstone's Commentaries, 234; *Clere v. Brooke*, Plow, 442.

### § 273. Principles of Descent in United States.

The English rules or canons of inheritance are of feudal origin and growth, and in their most essential features have been universally rejected in the United States.<sup>1</sup> Each state has adopted its own rules regulating the descent of real property, and while they differ materially as to details in the several states, they will in the main be found to be the converse of those which have obtained in England.<sup>2</sup> Thus the principles of primogeniture among males, the preference of males to females, the exclusion of the lineal ascent of the inheritance, and the entire exclusion of the half-blood, have generally been rejected as inconsistent with and unsuited to the character and policy of the different state governments.<sup>3</sup> Nor is it required in ascertaining who is heir that search be made for the first purchaser, and that his blood be traced to the claimant.<sup>4</sup> Generally, property descends to the next of kin to the deceased owner;<sup>5</sup> lineal descendants share equally per capita, if they stand in equal degree to the common ancestor;<sup>6</sup>

if in different degrees, they inherit per stirpes;<sup>7</sup> where lineal descendants fail, lineal ancestors are preferred to collateral branches;<sup>8</sup> but the ascending line, after parents, is postponed to the collateral line of brothers and sisters;<sup>9</sup> in some of the states no essential distinction is made between claims of the whole and of the half blood;<sup>10</sup> in other states a preference is given to the whole blood,<sup>11</sup> but in none of them is the half blood wholly excluded.<sup>12</sup> The above are given as a few of the general features common to the laws of descent in the several states, leaving the statutes of the particular state to be consulted as it respects details and points of variance.<sup>13</sup>

1 See 4 Kent's Commentaries, 385, 412; *Bogert v. Furman*, 10 Paige, 496; *Swezey v. Willis*, 1 Bradf. 495.

2 See *Haven v. Foster*, 9 Pick. 127; *Watkins v. Holman*, 16 Pet. 63; *Kean v. Hoffecker*, 2 Harr. (Del.) 103, 29 Am. Dec. 336; *Parker v. Nims*, 2 N. H. 460; *Bollerman v. Blake*, 24 Hun, 87; *Dukes v. Faulk*, 37 S. C. 255, 34 Am. St. Rep. 745.

3 *Kean v. Hoffecker*, 2 Harr. (Del.) 103, 29 Am. Dec. 336; *Watson v. Hill*, 1 McCord, 161; 4 Kent's Commentaries, 411, 412. Compare *Lewis v. Claiborne*, 5 Yerg. 369; *Armington v. Armington*, 28 Ind. 74.

4 *Cook v. Hammond*, 4 Mason, 484; sec. 271, ante. Compare *Posey v. Budd*, 21 Md. 489; *Chirac v. Reinecker*, 2 Pet. 625.

5 See *Kean v. Hoffecker*, 2 Harr. (Del.) 103, 29 Am. Dec. 336; *Curtis v. Hewins*, 11 Met. 294; *Cozzens v. Joslin*, 1 R. I. 122; *Hart's Appeal*, 8 Pa. St. 32; *Betts v. Wirt*, 3 Md. Ch. 113; *Brown v. Burlingham*, 5 Sand. 418; *Peacock v. Smart*, 17 Mo. 402; *Greenlee v. Davis*, 19 Ind. 60; *Beebee v. Griffing*, 14 N. Y. 235. In no sense are husband and wife next of kin to one another: *Townsend v. Radcliffe*, 44 Ill. 446.

6 4 Kent's Commentaries, 390, 391; *Dutoit v. Doyle*, 16 Ohio St. 400; *Hyatt v. Pugsley*, 33 Barb. 373; *McCracken v. Rogers*, 6 Wis. 278. See *Cramer's Estate*, 156 Pa. St. 40.

7 4 Kent's Commentaries, 391; and see *Brenneman's Appeal*, 40 Pa. St. 115; La. Civ. Code, art. 882.

8 See *Kelsey v. Hardy*, 20 N. H. 479; and see *Shellenberger v. Ransom*, 31 Neb. 61, 28 Am. St. Rep. 500. The rule is otherwise under the New York Revised Statutes: 1 Rev. Stats., sec. 10, p. 752. But it is laid down as a general rule in the American law of descent that grandparents take the estate before uncles and aunts, as being nearer of kin to the intestate, according to the computation of the civil law: 4 Kent's Commentaries 407; *Bruce v. Bissell*, 119 Ind. 525, 12 Am. St. Rep. 436; *Cables v. Prescott*, 67 Me. 582; *Smallman v. Powell*, 18 Or. 367, 17 Am. St. Rep. 742; see sec. 265, ante.

9 4 Kent's Commentaries, 407; see *Quinby v. Higgins*, 14 Me. 309. According to the New York statute of descents, the father inherits the whole estate of his intestate son, unmarried, and dying without issue, unless the inheritance came to the intestate on the part of his mother, in which case the father takes only a life estate: *Morris v. Ward*, 36 N. Y. 587. See *Torrey v. Shaw*, 3 Edw. Ch. 356. Descent between brother and sister is immediate, notwithstanding the alienage of the parent: *Bradley v. Dwight*, 62 How. Pr. 302.

10 *Sheffield v. Lovering*, 12 Mass. 490; *Beebee v. Grifing*, 14 N. Y. 235; *Alston v. Alston*, 7 Ired. 172; *Moore v. Abernathy*, 7 Blackf. 442; *Hatch v. Hatch*, 21 Vt. 450; *Tyson v. Postlethwaite*, 13 Ill. 732; *Nichol v. Dupree*, 7 Yerg. 415; *Baker v. Heiskell*, 1 Cold. 641; *Gardner v. Collins*, 3 Mason, 398; 2 Pet. 58.

11 *Kean v. Hoffecker*, 2 Harr. (Del.) 103, 29 Am. Dec. 336; *Whitcomb v. Reid*, 31 Miss. 567, 66 Am. Dec. 579; *Scott v. Terry*, 37 Miss. 65; *Petty v. Malier*, 15 B. Mon. 591; *Lee v. Smith*, 18 Tex. 141; and see *Walker v. Dunshiee*, 38 Pa. St. 430; *Stewart v. Jones*, 8 Gill & J. 1.

12 4 Kent's Commentaries, 404; and see *Kean v. Hoffecker*, 2 Harr. (Del.) 103, 29 Am. Dec. 336.

13 See abstract of statute rules of descent: 2 Greenleaf's *Cruise on Real Property*, 171; 2 Washburn on *Real Property*, \*417.

**§ 273a. Same—Miscellaneous.**

Under marriage settlements, the issue take their interests therein as purchasers under both parents.<sup>1</sup> Under California statute (Civ. Code, sec. 1386), the husband inherits the entire estate of his deceased wife when she dies intestate, leaving no issue, father, mother, brothers, nor sisters; though she left surviving her children and grandchildren of a deceased sister.<sup>2</sup>

1 Piper v. Hoord, 107 N. Y. 73, 1 Am. St. Rep. 789.

2 In re Ingram, 78 Cal. 586, 12 Am. St. Rep. 80.

**§ 274. Advancement.**

An advancement is said to be a pure and irrevocable gift by a parent in his lifetime to his child, on account of such child's share of the estate after the parent's decease.<sup>1</sup> And it is a principle universally recognized in the several states that, if a child has received such gift or advancement from the parent in his lifetime, the same must be deducted from such child's share in the distribution of the estate.<sup>2</sup> One essential element of an advancement is that it must once have been a part of the ancestor's estate, which, upon his death, would descend to his heirs but for the fact that it has, by the act of the ancestor in making the gift, been separated from or taken out of his estate, or it must be something which is purchased with the funds of the father in the name and for the benefit of the child.<sup>3</sup> The proof must be clear

that the advancement was intended, not as a mere gift, but as a part of the inheritance.<sup>4</sup> The intention of the donor, as indicated by all the circumstances attending the gift, decides its effect.<sup>5</sup> An advancement may be made either in personal property or in real estate;<sup>6</sup> and parol evidence is admissible to show an advancement.<sup>7</sup> Advancements are generally estimated at their value when they were given, or when the grantees came into possession of them;<sup>8</sup> or, as some of the decisions hold, according to their value at the time of the testator's death.<sup>9</sup> As a general rule, advancements do not bear interest,<sup>10</sup> nor is increase to be charged to the party to whom the advancement was made.<sup>11</sup> Lapse of time or limitation does not affect an advancement.<sup>12</sup> An advancement by parent to child operates to satisfy a debt due the child, if the advancement be in amount equal to or greater than the debt.<sup>13</sup>

1 Miller's Appeal, 31 Pa. St. 338; and compare Eshleman's Appeal, 74 Pa. St. 42; Cawthorn v. Coppedge, 1 Swan, 487; Dilman v. Cox, 23 Ind. 442; Crosby v. Covington, 24 Miss. 619; Sanford v. Sanford, 5 Lans. 486; 61 Barb. 299; O'Brien v. Shiel, 7 I. R. Eq. 255; Darne v. Lloyd, 82 Va. 859, 3 Am. St. Rep. 123; Wallace v. Reddick, 119 Ill. 156; Cazassa v. Cazassa, 92 Tenn. 573, 36 Am. St. Rep. 112; Hattersley v. Bissett, 51 N. J. Eq. 597, 40 Am. St. Rep. 532. By statute, in some of the states advancements are made to apply equally to grandchildren: Porter v. Poter, 51 Me. 376; Barber v. Taylor, 9 Dana, 85.

2 See Crosby v. Covington, 24 Miss. 619; Clark v. Wilson, 27 Md. 693; Hartwell v. Rice, 1 Gray, 587; Smith v. Smith, 21 Ala. 761; Lee v. Boak, 11 Gratt. 182.



3 Ison v. Ison, 5 Rich. Eq. 19; Weaver's Appeal, 63 Pa. St. 309; Sweet v. Northrup, 12 N. Y. Week. Dig. 377; Brown v. Burke, 22 Ga. 574; Page v. Page, 8 N. H. 187; Jackson v. Moore, 6 Cow. 706; Riker v. Kidder, 2 Madd. 101; 10 Ves. 366. Where a father purchased and paid for a policy of insurance on his own life in the name of his daughter, and for her sole benefit, and paid the annual premiums until his death, it was held that the amount of the policy and of the annual premiums after its purchase were advancements: Rickenbacker v. Zimmerman, 10 S. C. 110, 30 Am. Rep. 37; and so, to same effect, Cazassa v. Cazassa, 92 Tenn. 573, 36 Am. St. Rep. 112.

4 See Shewood v. Smith, 23 Conn. 516; Lawson's Appeal, 23 Pa. St. 85; Booth v. Foster, 111 Ala. 312, 56 Am. St. Rep. 52; Middleton v. Middleton, 31 Iowa, 151. Trifling gifts ought not to be charged as advancements: Sanford v. Sanford, 5 Lans. 486; 61 Barb. 293; Carmichael v. Lathrop, 112 Mich. 301. And money expended in the maintenance and education of a child is not in general to be deemed an advancement: Mitchell v. Mitchell, 8 Ala. 414; Riddle's Estate, 19 Pa. St. 431; McRae v. McRae, 3 Bradf. 199.

5 Murrell v. Murrell, 2 Strob. Eq. 148; Weaver's Appeal, 63 Pa. St. 309; Meeker v. Meeker, 16 Conn. 383. But compare Rees v. Rees, 11 Rich. Eq. 86.

6 Brown v. Burke, 22 Ga. 574; Shiver v. Brock, 2 Jones Eq. 137; Autrey v. Autrey, 37 Ala. 614. Compare Havens v. Thompson, 23 N. J. Eq. 321.

7 Parks v. Parks, 19 Md. 323; Brook v. Latimer, 44 Kan. 431, 21 Am. St. Rep. 292; Barbee v. Barbee, 109 N. C. 299; and see Bay v. Cooke, 31 Ill. 336; Parker v. McCluer, 5 Abb. Pr., N. S., 97; 3 Abb. Ct. App. 454; 36 How. Pr. 301; Cecil v. Cecil, 20 Md. 153. Compare Frey v. Heydt, 116 Pa. St. 601. Otherwise by statute, in Illinois: Wilkinson v. Thomas, 128 Ill. 363.

8 Wilks v. Green, 14 Ala. 443; Hughes' Appeal, 57 Pa. St. 179; Puryear v. Cabell, 24 Gratt. 260; Clark v. Wilson, 27 Md. 693; Hook v. Hook, 13 B. Mon. 526; Jackson v. Jackson, 28 Miss. 674; Cazassa v. Cazassa, 92 Tenn. 573, 36 Am. St. Rep. 118.

9 Miller's Appeal, 31 Pa. St. 337; and see McCaw v.

Blewit, 2 McCord, 91; Rickenbacker v. Zimmerman, 10 S. C. 110, 30 Am. Rep. 37.

10 Miller's Appeal, 31 Pa. St. 337; Krebs v. Krebs, 35 Ala. 293; Nelson v. Wyan, 21 Mo. 347.

11 Miller's Appeal, 31 Pa. St. 337; Osgood v. Breed, 17 Mass. 355; Towles v. Rountree, 19 Fla. 299.

12 Hughes' Appeal, 57 Pa. St. 179.

13 Brook v. Summers, 100 Ky. 620.

### § 274a. Same—Evidence, etc.

The weight of authority sustains the general rule that, when money or property is given by parent to child, the presumption is that an advancement was intended.<sup>1</sup> As between a loan, a gift, and an advancement, the presumption is in favor of an advancement, because of its tendency toward that equality of distribution among the children which is presumed to have been intended.<sup>2</sup> A purchase of land by a parent in the name of a child is deemed prima facie an advancement, so as to rebut the presumption of a trust resulting for the parent.<sup>3</sup> So a deed from parent to child for love and affection or for a nominal valuable consideration, is presumptively an advancement.<sup>4</sup> But there is no presumption of an advancement when the transaction between parent and child assumes the form of a conveyance for value.<sup>5</sup> And it is well settled that the presumption of an advancement may be rebutted by circumstances indicating that an advancement was not intended;<sup>6</sup> or such presumption may be rebutted by parol evidence,<sup>7</sup> unless precluded by statute in such case, as in Illinois.<sup>8</sup>

1 Holliday v. Wingfield, 59 Ga. 206; Allen v. De Groodt, 98 Mo. 159, 14 Am. St. Rep. 626; Fennell v. Henry, 70 Ala. 484, 45 Am. Rep. 88; Grattan v. Grattan, 18 Ill. 167, 65 Am. Dec. 726.

2 Patterson's Appeal, 128 Pa. St. 269.

3 Phillips v. Gregg, 10 Watts, 158, 36 Am. Dec. 158; Kern v. Howell, 180 Pa. St. 315, 57 Am. St. Rep. 641; Bogy v. Roberts, 48 Ark. 17, 3 Am. St. Rep. 211; White v. White, 52 Ark. 188; Higham v. Vanosdol, 125 Ind. 74.

4 Scott v. Harris, 127 Ind. 520; Hattersley v. Bissett, 51 N. J. Eq. 597, 40 Am. St. Rep. 532.

5 Appeal of Miller, 107 Pa. St. 221.

6 Hall v. Hall, 107 Mo. 101; Fennell v. Henry, 70 Ala. 484, 45 Am. Rep. 88; Watson v. Murray, 54 Ark. 499; Hattersley v. Bissett, 51 N. J. Eq. 597, 40 Am. St. Rep. 532.

7 Fennell v. Henry, 70 Ala. 484, 45 Am. Rep. 88; Barbee v. Barbee, 109 N. C. 299; Brook v. Latimer, 44 Kan. 431, 21 Am. St. Rep. 292.

8 Wilkinson v. Thomas, 128 Ill. 363.

### § 275. Lands Charged with Debt of Ancestor.

By the rule of the common law, land descended to the heir was not liable to the simple contract debts of the ancestor,<sup>1</sup> nor was the heir bound even by a specialty, unless he was expressly named.<sup>2</sup> But this rule has been altered by statute in the several states, and heirs take the land by descent subject to the payment of the debts of the ancestor, whether arising by simple contract or by specialty.<sup>3</sup> In fact and in law, they have no right to the real estate of their ancestors, except that of possession, until the creditors shall be paid.<sup>4</sup> The debts are an equitable lien upon the estate in the possession of the heir, and prior in

time to judgments recovered against them for their individual debts.<sup>5</sup> The personal estate is, however, the primary fund for the discharge of the debts, and is to be first applied and exhausted.<sup>6</sup> And heirs at law are, in a variety of cases, entitled to a "marshaling of assets," as it is called, in their favor;<sup>7</sup> as where an heir is sued by a bond creditor, he may in many cases be entitled to stand in the place of such specialty creditor against the personal estate of the deceased ancestor.<sup>8</sup> Under Texas law, if an intestate leaves, as heirs, children and a grandson, whose father, the son of the intestate, is dead, the grandson is not chargeable with a debt due from his father to his grandfather.<sup>9</sup>

1 3 Blackstone's Commentaries, 430; *Hays v. Jackson*, 6 Mass. 149.

2 Coke on Littleton, 209a; 4 Kent's Commentaries, 420.

3 See 4 Kent's Commentaries, 420; *Watkins v. Holman*, 16 Pet. 25; 2 N. Y. Rev. Stats., sec. 22, p. 452; *Chase v. Lockerman*, 11 Gill & J. 185, 35 Am. Dec. 277; *Gallagher's Appeal*, 48 Pa. St. 122; *McLean v. Wade*, 53 Pa. St. 146; *House v. Raymond*, 3 Hun, 44; *Lewon v. Heath*, 53 Neb. 707. And so by statute in England: Stat. 3 & 4 Wm. & Mary, c. 14; and see *Goodchild v. Terret*, 5 Beav. 398; 2 Lead. Cas. Eq. 78.

4 *Watkins v. Holman*, 16 Pet. 25. Under the Mexican system, on the death of an intestate, the heirs succeeded immediately to the estate, and became personally responsible for the debts of the deceased, whether they were adults or minors: *Coppinger v. Rice*, 33 Cal. 408; *McNeil v. Congregational Soc.*, 66 Cal. 108, 112.

5 *Morris v. Mowatt*, 2 Paige, 586, 22 Am. Dec. 661; and see *Cockrell v. Coleman*, 55 Ala. 583.

6 Hays v. Jackson, 6 Mass. 149; Bishop v. O'Conner, 69 Ill. 431; McLean v. McBean, 74 Ill. 134; Ward v. Ward, 15 Pick. 511; Livingston v. Livingston, 3 Johns. Ch. 148; Harvey v. Steptoe, 17 Gratt. 289; Salisbury v. Morss, 7 Lans. 359; Howel v. Price, 1 P. Wms. 291. But a judgment creditor need not show that proceedings had been taken against the administrator for the collection of his debt, and a failure, if he shows that the personal assets of the deceased were insufficient for the payment of his debts: Blossom v. Hatfield, 24 Hun, 275; and see Stuart v. Kissam, 11 Barb. 271.

7 See Hays v. Jackson, 6 Mass. 149; Livingston v. Newkirk, 3 Johns. Ch. 312; Schermerhorn v. Bashydt, 9 Paige, 49; Robards v. Wortham, 2 Dev. Eq. 173.

8 Galton v. Hancock, 2 Atk. 424; and see 2 Lead. Cas. Eq. 215.

9 Powers v. Morrison, 88 Tex. 133, 53 Am. St. Rep. 738; and see, to same effect, Valentine v. Borden, 100 Mass. 273; Kendall v. Mondell, 67 Md. 444. Otherwise in Pennsylvania: McConkey v. McConkey, 9 Watts, 353; Hughes' Appeal, 57 Pa. St. 179.

## CHAPTER XXV.

## DEED.

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## § 276. Definition and Nature of.

The most usual mode of acquiring an estate by purchase, at the present day, is that by deed or private grant.<sup>1</sup> An unlimited power of alienation existed in England, in the time of the Saxons, but after the Norman Conquest, and the establishment of the feudal law, all lands became unalienable.<sup>2</sup> The power of alienation was, however, gradually extended by the enactment of various statutes, and finally, by the statute of 12 Charles II, chapter 24, military tenures were abolished, and all freehold estates became thereby alienable without license or fine.<sup>3</sup> But the transfer of title to lands was not usually by writing, prior to the statute of frauds and perjuries of 29 Charles II, chapter 3.<sup>4</sup> By the provisions of this act, an instrument in writing was required, as a means of conveying lands or any interest therein, and such an instrument is called a deed.<sup>5</sup> The same pro-



visions have either been adopted, or assumed to be law, in the several states of the Union, and a writing having all the necessary requisites of a deed is required, if the interest to be thereby transferred is a freehold one.<sup>6</sup> In this connection, a deed may therefore be defined as an instrument in writing, under seal, by which lands, tenements, or hereditaments, for an estate not less than a freehold, are conveyed.<sup>7</sup> "Conveyance" is the common statutory word used to denote the deed, act, or instrument by which property in real estate is transferred.<sup>8</sup> The term "grantor" is the most comprehensive to signify one who conveys lands, and he to whom the conveyance is made is called the "grantee."<sup>9</sup> One having sold land will be presumed to have made a deed to the purchaser, such being the usual and ordinary course of business.<sup>10</sup>

1 See 2 Blackstone's Commentaries, 287; 2 Greenleaf's Cruise on Real Property, 296.

2 2 Greenleaf's Cruise on Real Property, 297; 4 Kent's Commentaries, 441 et seq. Meaning of term "alienation": See *Hendrix v. Seaborn*, 25 S. C. 481, 60 Am. Rep. 520; *Union Ins. Co. v. Barwick*, 36 Neb. 235; *Turner v. Bennett*, 70 Ill. 267; *Muldoon v. Moore*, 55 N. J. L. 417; *Harty v. Doyle*, 49 Hun, 413; *Gould v. Head*, 41 Fed. Rep. 245; sec. 17, ante.

3 2 Blackstone's Commentaries, 289; and see *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278; *De Peyster v. Michael*, 6 N. Y. 467, 57 Am. Dec. 470.

4 See 1 Spence's Equity Jurisdiction, 8, 20; *Burton on Real Property*, sec. 20; *Williams on Real Property*, \*147.

5 Burton on Real Property, sec. 20. It is called a deed, in Latin factum, because it is the most solemn and authentic act that a man can perform in the disposal of his property: Coke on Littleton, 35b; 2 Blackstone's Commentaries, 297; Hammond v. Alexander, 1 Bibb, 333.

6 4 Kent's Commentaries, 450; and see Cunningham v. Freeborn, 11 Wend. 240; Stewart v. Clark, 13 Met. 79.

7 Stewart v. Clark, 13 Met. 79; Whitney v. Swett, 22 N. H. 10, 53 Am. St. Rep. 228; Jackson v. Wood, 12 Johns. 73; and see Wing v. Chase, 35 Me. 260; M'Cabe v. Hunter, 7 Mo. 355; Taylor v. Morton, 5 Dana, 365; Thompson v. Gregory, 4 Johns. 81, 4 Am. Dec. 255; Best v. Brown, 25 Hun, 224.

8 Dudley v. Sumner, 5 Mass. 472; Livermore v. Bagley, 3 Mass. 510. See Brown v. Fitz, 13 N. H. 285; Klein v. McNamara, 54 Miss. 105. The word "convey" passes the title as effectually as a grant at common law: Patterson v. Carnall, 3 A. K. Marsh. 618, 13 Am. Dec. 208.

9 Dudley v. Sumner, 5 Mass. 472.

10 Fox v. Windes, 127 Mo. 502, 48 Am. St. Rep. 648; Fitzgerald v. Barker, 85 Mo. 13.

### § 277. Essentials of a Good Deed.

Briefly stated, the circumstances usually deemed necessary to the validity of a deed of conveyance are: 1. Writing on paper or parchment; 2. Sufficient parties; 3. A good and sufficient consideration; 4. Apt words required by law; 5. Sealing; 6. Delivery.<sup>1</sup> And where a statute requires that a deed of land shall be attested by witnesses, such attestation is essential to a valid conveyance.<sup>2</sup> And it may be observed generally, in this connection, that the forms and solemnities requisite to pass the title to land must be in conformity to the laws of the state in which the land is situated.<sup>3</sup>

1 See Coke on Littleton, 35b; 2 Greenleaf's Cruise on Real Property, 308; 2 Blackstone's Commentaries, 296; Chiles v. Conley, 2 Dana, 21; Sicard v. Davis, 6 Pet. 124; Jackson v. Schoomaker, 2 Johns. 235, 3 Am. Dec. 410; Long v. Ramsay, 1 Serg. & R. 72; Duncan v. Hodges, 4 McCord, 239, 17 Am. Dec. 734.

2 Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430. Compare Dole v. Thurlow, 12 Met. 165.

3 Doe v. Nelson, 3 McLean, 383; Clark v. Graham, 6 Wheat. 577; McCormick v. Sullivant, 10 Wheat. 202; Meighen v. Strong, 6 Minn. 177, 80 Am. Dec. 441; Robinson v. Bland, 2 Burr. 1079. Compare Root v. Brother-son, 4 McLean, 230; Baygents v. Beard, 41 Miss. 531.

### § 278. On What Material Written.

A deed must be written (or printed) on paper or parchment, and if written on any other material, such as wood, stone, linen, leather, or the like, it is not a good deed, though it be sealed and delivered.<sup>1</sup> The reason given for the rule is, that a writing on paper or parchment is less likely to be altered, vitiated, or corrupted.<sup>2</sup> As it respects grammatical structure or orthography, the law is less strict, and the writing may be in any known language, or in any hand; false Latin or English, though it be very bad, will not render a deed void.<sup>3</sup>

1 Coke on Littleton, 35b; Warren v. Lynch, 5 Johns. 246; 1 Broom & Hadley's Commentaries, Wait's ed., 724.

2 2 Blackstone's Commentaries, 297; 2 Greenleaf's Cruise on Real Property, 325.

3 Shrewsbury's Case, 9 Rep. 48; Sheppard's Touchstone, 55.

### § 279. Filling Blanks.

It has generally been held that all the matter of a deed must be written before delivery;<sup>1</sup> and that a blank paper, signed, sealed, and delivered, and then written upon, is no deed.<sup>2</sup> But a deed may be signed and sealed, and then filled up, if this be done before delivery.<sup>3</sup> And in a recent case in Iowa, in which state a seal is not necessary to the validity of a deed, it was held that where a grantor delivers a deed, executed in blank as to the grantee, under circumstances implying authority to the receiver to insert the grantee's name, such name may be inserted by him or by another authorized by him, so as to confer a title on an innocent purchaser.<sup>4</sup> So the rule that a parol authority is adequate to authorize an addition to a sealed instrument, after delivery, is sustained by many recent decisions.<sup>5</sup>

1 Davidson v. Cooper, 11 Mees. & W. 793; Burns v. Lynde, 6 Allen, 305; Bashford v. Pearson, 9 Allen, 387; Bragg v. Fessenden, 11 Ill. 544; Enthoven v. Hoyle, 13 Com. B. 373.

2 Davidson v. Cooper, 11 Mees. & W. 793; Duncan v. Hodges, 4 McCord, 239; Smith v. Fellows, 9 Jones & S. 36.

3 Duncan v. Hodges, 4 McCord, 239; Hudson v. Revett, 5 Bing. 368.

4 Swartz v. Ballou, 47 Iowa, 188, 29 Am. Rep. 470; and so, to same effect, McCleery v. Wakefield, 76 Iowa, 529; Cribben v. Deal, 21 Or. 211, 28 Am. St. Rep. 746; Lafferty v. Lafferty, 42 W. Va. 789.

5 Inhabitants etc. v. Huntress, 53 Me. 89, 87 Am. Dec. 535; Cooper v. Page, 62 Me. 192; Bridgeport Bank v. Railroad Co., 30 Conn. 231; Gourdin v. Commander,

6 Rich. 497; Devin v. Himer, 29 Iowa, 297; Field v. Stagg, 52 Mo. 534, 14 Am. Rep. 435; Van Etten v. Evanson, 28 Wis. 33, 9 Am. Rep. 486; Schintz v. McManamy, 33 Wis. 299; Field v. Stagg, 52 Mo. 534, 14 Am. Rep. 435; State v. Young, 23 Minn. 551; Ragsdale v. Robinson, 48 Tex. 379; and see Drury v. Foster, 2 Wall. 24; Allen v. Withrow, 110 U. S. 119. But see contra, Upton v. Archer, 41 Cal. 85, 10 Am. Rep. 266; Viser v. Rice, 33 Tex. 139; Preston v. Hull, 23 Gratt. 600, 14 Am. Rep. 153; Adamson v. Hartman, 40 Ark. 61; Squire v. Whitton, 1 H. L. Cas. 333.

### § 280. Effect of Alterations, etc.

Alterations, erasures, or interlineations made in any part of the deed before delivery will not vitiate the deed,<sup>1</sup> but they should in some way be noted upon the instrument itself, in order to show that they were made before delivery.<sup>2</sup> If made after delivery, either by the party benefited or by a stranger, if in a material part, the effect will be to avoid the deed, unless done by the consent of the maker.<sup>3</sup> And the question whether the alterations, etc., apparent on the face of the deed were made prior or subsequent to the delivery thereof, is to be settled by the jury upon all the evidence in the case.<sup>4</sup> But upon this point the decisions are not harmonious—some holding that such alterations will be presumed to have been made at the time of the making of the deed,<sup>5</sup> while others hold the presumption to be that they were made after execution and delivery;<sup>6</sup> and that the law imposes upon the party who claims under the instrument the burden of explaining the alterations.<sup>7</sup> And especially if an alteration appears

suspicious on its face, and is not duly noted on the paper, the burden of proof is upon the party who claims that the alteration was genuine.<sup>8</sup>

1 Sheppard's Touchstone, 55; *Raviesles v. Alston*, 5 Ala. 297; *Wickes v. Caulk*, 5 Har. & J. 36. See sec. 279, ante; *Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 334.

2 See *Acker v. Ledyard*, 8 Barb. 514; *Arrison v. Harmstead*, 2 Pa. St. 191; *Britton v. Stanley*, 4 Whart. 114; *O'Donnell v. Harmon*, 3 Daly, 424; and see *Collins v. Collins*, 51 Miss. 311, 24 Am. Rep. 632.

3 *Withers v. Atkinson*, 1 Watts, 237; *Cleaton v. Chambliss*, 6 Rand. 86; *Huntington v. Finch*, 3 Ohio St. 445; *Bliss v. McIntyre*, 18 Vt. 466; *Letcher v. Bates*, 6 J. J. Marsh. 524, 22 Am. Dec. 92; *Warring v. Williams*, 8 Pick. 322; *Lewis v. Payn*, 8 Cow. 71; *Den v. Wright*, 7 N. J. L. 175, 11 Am. Dec. 546; *Deem v. Phillips*, 5 W. Va. 168; *Hollis v. Harris*, 96 Ala. 288. Compare *Pope v. Chafee*, 14 Rich. Eq. 69; *Gordon v. Sizer*, 39 Miss. 805; *Langdon v. Paul*, 20 Vt. 217. An alteration, though made subsequently to the execution of the deed, and feloniously, does not avoid the title: *Jackson v. Jacoby*, 9 Cow. 125; and see *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; and see *Robertson v. Hay*, 91 Pa. St. 242; *Moore v. Ivers*, 83 Mo. 29; *Ames v. Brown*, 22 Minn. 257, holding that an alteration of a deed by a stranger without the knowledge, consent, or privity of the party interested, even though in a material part, will not render it void. So, to same effect, *Gleason v. Hamilton*, 138 N. Y. 353; *Nickerson v. Swett*, 135 Mass. 514. A deed by husband and wife, altered after execution by the husband without authority of the wife, vitiates the deed: *Stone v. Lord*, 80 N. Y. 60. Compare *Prettyman v. Goodrich*, 23 Ill. 330.

4 *Ely v. Ely*, 6 Gray, 441; and see *Smith v. McGowan*, 3 Barb. 404; *Maybee v. Sniffin*, 2 E. D. Smith, 1; 16 N. Y. 560; *Roberts v. Unger*, 30 Cal. 676; *Howard v. Colquhoun*, 28 Tex. 134; *Gandy v. Dewey*, 28 Neb. 175; *Martin v. Kline*, 157 Pa. St. 473; *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754; *Coke on Littleton*, 225b; *Knight v. Clements*, 8 Ad. & E. 215.

5 *Trowel v. Castle*, 1 Keb. 22; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Sirriner v. Briggs*, 31 Mich.

443; *Huntington v. Finch*, 3 Ohio St. 445; *Stoner v. Ellis*, 6 Ind. 152; *Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321; *McCormick v. Fitzmorris*, 39 Mo. 34; *Farnsworth v. Sharp*, 4 Sneed, 55; *Doe v. Bingham*, 44 Barn. & Adol. 672.

6 *Morris v. Vanderen*, 1 Dall. 67; *Paine v. Edsell*, 19 Pa. St. 180; *White v. Haas*, 32 Ala. 432, 70 Am. Dec. 548; *Cole v. Hills*, 44 N. H. 227; *Provost v. Gratz*, 1 Pet. C. C. 365; *Craft v. White*, 36 Miss. 455.

7 *Jordon v. Stewart*, 23 Pa. St. 244; *Dow v. Jewell*, 18 N. H. 340; *United States v. Linn*, 1 How. 104; *Montag v. Linn*, 23 Ill. 551.

8 *O'Donnell v. Harmon*, 3 Daly, 424; and see *Pringle v. Chambers*, 1 Abb. Pr. 58. See, further, as to the burden of proof in case of alterations, *Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832; *Franklin v. Baker*, 48 Ohio St. 296, 29 Am. St. Rep. 547; *Bedgood v. McClain*, 89 Ga. 793.

## § 281. Who may Convey by.

As a general rule, all persons who are capable of holding real property, and who are not under some disability, as infancy,<sup>1</sup> coverture,<sup>2</sup> or the like, may freely convey the same by deed.<sup>3</sup> So corporations, which are artificial persons, are capable of conveying away real property by deed.<sup>4</sup> A person deaf and dumb from his nativity, if of sufficient capacity in other respects, is not legally incapable of executing a deed.<sup>5</sup> And the tendency of modern adjudications is to regard a deed, if not absolutely binding, as voidable rather than void.<sup>6</sup> All persons having any estate, right, title, or interest, either at law or in equity, in the subject matter of a deed, must join in the conveyance, or their rights will remain.<sup>7</sup>

1 See sec. 284, post.

2 See sec. 283, post.

3 See *Den v. Clark*, 2 Ired. 23; *Wait v. Maxwell*, 5 Pick. 217, 16 Am. Dec. 391; *Dicken v. Johnson*, 7 Ga. 484; *Zouch v. Parsons*, 3 Burr. 1805; sec. 285, post.

4 See *Boone on Corporations*, sec. 54.

5 *Brown v. Brown*, 3 Conn. 299, 8 Am. Dec. 187.

6 See *Dennett v. Dennett*, 44 N. H. 538, 84 Am. Dec. 97; *Miles v. Lingeran*, 24 Ind. 387; *Hovey v. Hobson*, 53 Me. 451, 89 Am. Dec. 705; *Den v. Clark*, 2 Ired. 23.

7 2 *Greenleaf's Cruise on Real Property*, 308. See *Lithgow v. Kavenagh*, 9 Mass. 161; *Adams v. Bean*, 12 Mass. 137, 7 Am. Dec. 44; *Scott v. Whipple*, 5 Me. 336; *Giles v. Pratt*, 2 Hill (S. C.), 439. A deed by a person disseised is valid against every one but the disseisor and his privies: *McMahan v. Bowe*, 114 Mass. 140, 19 Am. Rep. 321; *Livingston v. Proseus*, 2 Hill, 526; *University of Vermont v. Joslyn*, 21 Vt. 52.

## § 282. Who may be Grantees.

In order to render a conveyance of land valid, there must be a grantee competent to take it.<sup>1</sup> But less capacity is required to take than to make a grant, and by the rule of the common law, all persons whatever may be grantees in a deed, because it is supposed to be for their benefit.<sup>2</sup> And a person may take an estate in remainder by a deed to which he is not a party.<sup>3</sup> A corporation may be a grantee, unless expressly restrained by its charter;<sup>4</sup> but in this country corporations are usually limited in the acts of incorporation as to the value or amount of real property which they may hold.<sup>5</sup> At common law, a wife cannot be the immediate grantee of her husband, but she may take an estate from him through the medium of



the statute of uses.<sup>6</sup> And equity will uphold a conveyance from husband to wife, though no trustee has been interposed to hold for the wife's use.<sup>7</sup> An alien may be grantee in a deed, and may hold until "office found."<sup>8</sup> A deed which professes to convey to a corporation by name which has no valid existence is a nullity, and passes no title to anyone.<sup>9</sup> So an unincorporated town or village cannot take and hold the legal title to land by deed, for the reason that there is no grantee in being in whom the title can vest.<sup>10</sup> But a deed to persons therein named as trustees and to their heirs and assigns, for the use and benefit of an unincorporated town or village, is valid, and the grantees do not take as trustees or holders of a mere nominal title, but they take the absolute legal title.<sup>11</sup> The public is an ever-existing grantee capable of taking dedications for public use; hence, a general grant of a right of way over public lands for highway purposes cannot be avoided for want of a grantee.<sup>12</sup>

1 See *Bundy v. Birdsall*, 29 Barb. 31; *Hulick v. Scovil*, 4 Ill. 191; *Miller v. Chittenden*, 2 Iowa, 368.

2 2 *Greenleaf's Cruise on Real Property*, 319; and see *Sutton v. Cole*, 3 Pick. 332; *Parker v. Stuckert*, 2 Miles, 278; *Halluck v. Bush*, 2 Root, 26, 1 Am. Dec. 60; *Mitchell v. Ryan*, 3 Ohio St. 377. Compare *Bennett v. Waller*, 23 Ill. 97.

3 *Hornbeck v. Westbrook*, 9 Johns. 73.

4 *Boone on Corporations*, sec. 40; *Kenny v. Wallace*, 24 Hun, 478. A deed of land to the trustees de facto of an unincorporated religious society does not convey

any title to the society: *Bundy v. Birdsall*, 29 Barb. 31. See *Thomas v. Marshfield*, 10 Pick. 364.

5 *Boone on Corporations*, sec. 40.

6 See *Voorhees v. Presbyterian Church*, 17 Barb. 103; *Sweat v. Hall*, 8 Vt. 187; *Abbott v. Hurd*, 7 Blackf. 510; *Shepard v. Shepard*, 7 Johns. Ch. 57; sec. 151, ante.

7 *Wallingford v. Allen*, 10 Pet. 583; *Dale v. Lincoln*, 62 Ill. 22; *Majors v. Everton*, 89 Ill. 56, 31 Am. Rep. 65.

8 *Jackson v. Lunn*, 3 Johns. Cas. 109; *Fairfax v. Hunter*, 7 Cranch, 603; *Sheaffe v. O'Neil*, 1 Mass. 256; *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430; *Sands v. Lynham*, 27 Gratt. 291, 21 Am. Rep. 348; and see sec. 19, ante.

9 *Douthitt v. Stinson*, 63 Mo. 268; *Russell v. Topping*, 5 McLean, 195.

10 *Hornbeck v. Westbrook*, 9 Johns. 73; *Miller v. Rosenberger*, 144 Mo. 292.

11 *Miller v. Rosenberger*, 144 Mo. 292; and so, to same effect, *Towar v. Hale*, 46 Barb. 361; *King v. Townshend*, 141 N. Y. 358; *Austin v. Shaw*, 10 Allen, 552.

12 *Wells v. Pennington County*, 2 S. Dak. 1, 39 Am. St. Rep. 758.

### § 282a. Deed from Husband to Wife.

A deed of real estate directly from husband to wife will be upheld, so far as it is equitable.<sup>1</sup> The equitable title vests in the wife, though such deed is void at law.<sup>2</sup> And a reasonable voluntary deed from husband to wife will be upheld against the husband's heirs.<sup>3</sup> So a voluntary deed direct from husband to wife, made in good faith, the husband not being in debt, will be sustained against subsequent creditors of the husband.<sup>4</sup> A conveyance from husband to wife of real property including their homestead is valid.<sup>5</sup> And a volun-

tary deed from husband to wife is not invalid because it conveys a homestead, a conveyance of which is required to be executed by both husband and wife.<sup>6</sup>

1 O'Connell v. Taney, 16 Colo. 353, 25 Am. St. Rep. 275; Rose v. Latshaw, 90 Pa. St. 238; Munger v. Baldridge, 41 Kan. 236, 13 Am. St. Rep. 273; Callahan v. Houston, 78 Tex. 494.

2 Turner v. Shaw, 96 Mo. 22, 9 Am. St. Rep. 319; Bush v. Henry, 85 Ala. 605.

3 Horder v. Horder, 23 Kan. 391, 33 Am. Rep. 167; Majors v. Everton, 89 Ill. 56, 31 Am. Rep. 65; Corcoran v. Corcoran, 119 Ind. 138, 12 Am. St. Rep. 390.

4 Thompson v. Allen, 103 Pa. St. 44, 49 Am. Rep. 116; and see, to same effect, Jansen v. Lewis, 52 Neb. 556; Lavigne v. Tobin, 52 Neb. 686; Warlick v. White, 86 N. C. 139, 41 Am. Rep. 453. Compare Steele v. Coon, 27 Neb. 586, 20 Am. St. Rep. 705, and note.

5 Johnson v. Brouch, 9 S. Dak. 116, 62 Am. St. Rep. 857. Compare Turner v. Bernheimer, 95 Ala. 241, 36 Am. St. Rep. 207, and note.

6 Furrow v. Athey, 21 Neb. 671, 59 Am. Rep. 867.

### § 283. Conveyances by Married Women.

By the rule of the common law, all deeds executed by a married woman are absolutely void,<sup>1</sup> even as against her heirs.<sup>2</sup> And formerly, in England, the only mode in which a married woman could alienate her lands was by fine and recovery.<sup>3</sup> This mode was never in use in the United States;<sup>4</sup> but the general rule here is, that a married woman, if of lawful age, may convey her real estate, or release all her interest in her husband's lands, by a deed executed jointly with her husband.<sup>5</sup> And by the aid of enabling acts

in many of the states, she may convey her lands without her husband, as freely as if she were unmarried.<sup>6</sup> But unless executed in the precise mode prescribed by statute, the conveyance will be void.<sup>7</sup>

1 Sheppard's Touchstone, 56; 2 Greenleaf's Cruise on Real Property, 315, 316; Bressler v. Kent, 61 Ill. 426, 14 Am. Rep. 67; Ezelle v. Parker, 41 Mo. 520; Warner v. Crouch, 14 Allen, 163; Dunham v. Wright, 53 Pa. St. 167.

2 Matthews v. Puffer, 19 N. H. 448; Concord Bank v. Bellis, 10 Cush. 276; Lowell v. Daniels, 2 Gray, 161, 61 Am. Dec. 448.

3 Bressler v. Kent, 61 Ill. 426, 14 Am. Rep. 67; Albany Fire Ins. Co. v. Bay, 4 N. Y. 9. By statute 3 & 4 William IV, chapter 74, for abolishing fines, and recoveries, provision is made whereby a married woman may now join with her husband in making a deed of her estate: See 2 Greenleaf's Cruise on Real Property, 315, note. She may pass her separate real estate by deed as a feme sole: Pride v. Bubb, L. R. 7 Ch. App. 64; 1 Eng. Rep. 426.

4 See Jackson v. Gilchrist, 15 Johns. 115; Durant v. Ritchie, 4 Mason, 54.

5 2 Kent's Commentaries, 150; Fowler v. Shearer, 7 Mass. 14; Lithgow v. Kavenagh, 9 Mass. 172; Allen v. Hooper, 50 Me. 374; Davey v. Turner, 1 Dall. 11; and see Richardson v. Wyman, 62 Me. 280, 16 Am. Rep. 459; Maloney v. Horan, 49 N. Y. 111, 10 Am. Rep. 335; Ridgeway v. Masting, 23 Ohio St. 294, 13 Am. Rep. 251.

6 See Yale v. Dederer, 18 N. Y. 271; White v. Wager, 25 N. Y. 333; Price v. Osborn, 34 Wis. 40; Turner v. Shaw, 96 Mo. 22, 9 Am. St. Rep. 319; Robinson v. Queen, 87 Tenn. 445, 10 Am. St. Rep. 690. She may convey her real estate acquired before as well as after the marriage, without the joining of the husband in the conveyance: McKesson v. Stanton, 50 Wis. 297, 36 Am. Rep. 850.

7 See Reaume v. Chambers, 22 Mo. 54; Morrison v. Wilson, 13 Cal. 498; Maclay v. Love, 25 Cal. 374, 85

Am. Dec. 135: *Leonis v. Lazzarovich*, 55 Cal. 57; *Wambole v. Foote*, 2 Dak. Ter. 23; *Bressler v. Kent*, 61 Ill. 426, 14 Am. Rep. 67; *Logan v. Gardner*, 136 Pa. St. 588, 20 Am. St. Rep. 939; *Utzfield v. Bodman*, 76 Tex. 359.

§ 283a. Same—Continued.

Although a married woman may sell her separate estate and convey the same by her own deed, she can convey her real property which is not her separate estate only by a deed jointly executed by herself and husband.<sup>1</sup> And under the Pennsylvania act of 1883, although a married woman may convey her property, her husband must join in the deed in order to convey her title thereto.<sup>2</sup> So a deed by a married woman, of property belonging to her separate estate, in which she is joined by her husband, is not valid unless acknowledged by her as required by law.<sup>3</sup> And a deed by husband and wife must have been signed by him when acknowledged by her. She cannot acknowledge a paper not signed by him.<sup>4</sup> In Arkansas, a married woman may convey her estate and acknowledge the execution of a deed for registration as a feme sole, and if her acknowledgment be insufficient to admit it to registration, it will still be good between her and her grantee.<sup>5</sup> The burden is on the party claiming under a deed from a married woman to prove that it was correctly acknowledged.<sup>6</sup> A married woman's deed, defective for the reason that her husband did not join therein, is not validated by a subsequent

deed executed by the husband alone.<sup>7</sup> Under a statute authorizing a husband and wife to contract with each other, she may make a valid conveyance of her separate estate directly to him for a valuable consideration in the absence of an abuse of the confidential relations between them.<sup>8</sup>

1 *Richardson v. De Giverville*, 107 Mo. 422, 28 Am. St. Rep. 426.

2 *Banck v. Swan*, 146 Pa. St. 444.

3 *Goff v. Roberts*, 72 Mo. 570; *Louisville etc. Ry. Co. v. Wilhite* (Ky. Ct. App.), 29 S. W. Rep. 326; *Bagby v. Emberson*, 79 Mo. 139; *Tavener v. Barrett*, 21 W. Va. 656; *Coal Creek Min. Co. v. Heck*, 83 Tenn. 497; *Hayden v. Moffatt*, 74 Tex. 647, 15 Am. St. Rep. 866; *Central Land Co. v. Laidley*, 32 W. Va. 134, 25 Am. St. Rep. 797.

4 *Cecil v. Clark*, 44 W. Va. 659.

5 *Roberts v. Wilcoxson*, 36 Ark. 355.

6 *Logan v. Gardner*, 136 Pa. St. 588, 20 Am. St. Rep. 939.

7 *Rollins v. Mitchell*, 52 Minn. 41, 38 Am. St. Rep. 519.

8 *Osborne v. Cooper*, 113 Ala. 405, 59 Am. St. Rep. 117; and see, also, *Williams v. Harris*, 4 S. Dak. 22, 46 Am. St. Rep. 753; *Sims v. Ray*, 96 N. C. 87; *Turner v. Shaw*, 96 Mo. 22, 9 Am. St. Rep. 323, and note; *Rico v. Brandenstein*, 98 Cal. 465, 35 Am. St. Rep. 192.

## § 284. Deeds of Infants.

The rule as established by the modern decisions appears to be, that the deed of an infant, conveying his land for a valuable consideration, is voidable and not void;<sup>1</sup> and that the right to avoid the deed on coming of age is a personal privilege to the minor and his heirs.<sup>2</sup> But an infant's

deed, without consideration, is absolutely void, and not simply voidable.<sup>3</sup> And a person purchasing land of an infant, knowing the fact, must and ought to take the risk of the avoidance of the contract by the infant after arriving at maturity.<sup>4</sup> Nor can a restoration of the consideration be exacted as a condition to a disaffirmance of the contract on the part of the infant.<sup>5</sup> It has, however, been held that if an infant would avoid his deed he must do so within a reasonable time after coming of age.<sup>6</sup> And when delay is coupled with acts indicating an intention to confirm, or which cause injury to others, or secure benefits to himself, it becomes proof of confirmation more or less potent, according to the accompanying acts and circumstances.<sup>7</sup> Thus, an infant's deed binds him, if, after coming of age, he knowingly suffers the grantee to make valuable improvements on the premises, without announcing his intention to avoid the deed.<sup>8</sup> But mere delay within the time allowed by the statute of limitations, uncoupled with any acts expressive of an intent to confirm, would not be sufficient for that purpose.<sup>9</sup>

1 *Zouch v. Parsons*, 3 Burr. 1805; *Tucker v. Moreland*, 10 Pet. 58; *Robinson v. Weeks*, 56 Me. 106; *Kendell v. Lawrence*, 22 Pick. 540; *Logan v. Gardner*, 136 Pa. St. 588, 20 Am. St. Rep. 939; *Craig v. Van Bebbler*, 100 Mo. 584, 18 Am. St. Rep. 569, and note 582; *Englebert v. Troxell*, 40 Neb. 195, 42 Am. St. Rep. 665; and see *Harner v. Dipple*, 31 Ohio St. 72, 29 Am. Rep. 496.

2 *Kendell v. Lawrence*, 22 Pick. 540; *Dolph v. Hand*, 156 Pa. St. 91, 36 Am. St. Rep. 25. But compare

Chandler v. Simmons, 97 Mass. 508, 93 Am. Dec. 117.

3 Swafford v. Ferguson, 3 Lea, 292, 31 Am. Rep. 639; Robinson v. Coulter, 90 Tenn. 705, 25 Am. St. Rep. 708.

4 Jackson v. Carpenter, 11 Johns. 539; Boody v. McKenney, 23 Me. 524; Dublin etc. Ry. v. Black, 8 Ex. 181; 16 Eng. L. & Eq. 558; Sims v. Everhardt, 102 U. S. 300.

5 Green v. Green, 69 N. Y. 553, 25 Am. Rep. 233. Compare Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 569.

6 See Wallace v. Lewis, 4 Harr. (Del.) 75; Sims v. Everhardt, 102 U. S. 300; Searcy v. Hunter, 81 Tex. 644, 26 Am. St. Rep. 837; Dolph v. Hand, 156 Pa. St. 91, 36 Am. St. Rep. 25; Amey v. Cockey, 73 Md. 298; 2 Kent's Commentaries, 236.

7 Dana v. Coombs, 6 Me. 89; Boody v. McKenney, 23 Me. 524; and see Robbins v. Eaton, 10 N. H. 561; Chapin v. Shafer, 49 N. Y. 407; Wheaton v. East, 5 Yerg. 41.

8 Davis v. Dudley, 70 Me. 236, 35 Am. Rep. 318; and see Highley v. Barron, 49 Me. 103; Thompson v. Strickland, 52 Miss. 574; Wallace v. Lewis, 4 Harr. (Del.) 75; Gillespie v. Bailey, 12 W. Va. 70, 29 Am. Rep. 445.

9 Davis v. Dudley, 70 Me. 236, 35 Am. Rep. 318; Vaughan v. Parr, 20 Ark. 600; McMurray v. McMurray, 66 N. Y. 175; Huth v. Railway etc. Co., 56 Mo. 202; Moore v. Abernethy, 7 Blackf. 442.

### § 284a. Same—Continued.

The disabilities of coverture and infancy are separate and independent, and the mere fact that they both occur in connection with the same act does not give either of them any greater force than it would have had separately. Hence, if an infant feme covert has executed a deed properly, the only objection the party relying on it has to meet is that of infancy.<sup>1</sup> A conveyance by a



grantor or his heirs is one mode of disaffirming his prior deed during infancy.<sup>2</sup> A deed disaffirmed because of the minority of the wife is avoided as to the husband, who joined her in executing it.<sup>3</sup> A deed made by a minor in execution of a trust cannot be disaffirmed by him.<sup>4</sup> And unpaid purchase money is not recoverable by an infant who repudiates his deed.<sup>5</sup>

1 Logan v. Gardner, 136 Pa. St. 588, 20 Am. St. Rep. 939.

2 Searcy v. Hunter, 81 Tex. 644, 26 Am. St. Rep. 837; Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 569.

3 Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 569.

4 Nordholt v. Nordholt, 87 Cal. 552, 22 Am. St. Rep. 268.

5 Craig v. Van Bebber, 100 Mo. 584, 18 Am. St. Rep. 569.

### § 285. By Persons of Unsound Mind.

A deed executed by an idiot, or person of non-sane mind, who is under guardianship, is void;<sup>4</sup> but a deed made by such a person not under guardianship passes a seisin, and is regarded as voidable only, and not void.<sup>2</sup> And it is held that where a person of apparently sound mind, and not known to be otherwise, executes a deed, equity will not interfere to set aside such deed, where the grantee cannot be put in statu quo, or where the benefit received by the grantor is actual, and of a durable character.<sup>3</sup> A deed cannot be impeached on the ground that the grantor, at the

time of execution, was a monomaniac on the subject of religion.<sup>4</sup> And a habitual drunkard is not incompetent to execute a deed;<sup>5</sup> he is simply incompetent upon proof that at the time his understanding was clouded, or his reason dethroned by actual intoxication.<sup>6</sup> The presumption of law is that the grantor in a deed was and is competent to execute it at the time of its execution.<sup>7</sup> Old age is not of itself sufficient evidence of incapacity to make a deed.<sup>8</sup> And the fact that the mind of a grantor may have been somewhat impaired by age or disease does not justify a court in setting aside his deed. The deed is valid if the grantor has sufficient mental capacity to properly understand and comprehend its nature, character, and scope.<sup>9</sup>

1 Wait v. Maxwell, 5 Pick. 217, 16 Am. Dec. 391.

2 Wait v. Maxwell, 5 Pick. 217; Arnold v. Richmond Iron Works, 1 Gray, 434; Jackson v. Gumaer, 2 Cow. 552; Breckinridge v. Ormsby, 1 J. J. Marsh. 245; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 717; and see Hovey v. Hobson, 53 Me. 451; Miles v. Lingerian, 24 Ind. 387. Some of the cases, however, hold that a deed regular on its face will be declared void whenever the testimony submitted shows that the person executing it was at the time of its execution non compos mentis; Farley v. Parker, 6 Or. 105, 25 Am. Rep. 504; Van Deusen v. Sweet, 51 N. Y. 383.

3 Riggan v. Green, 80 N. C. 236, 30 Am. Rep. 77; and see Carr v. Holliday, 1 Dev. & B. Eq. 344; Molton v. Camroux, 2 Ex. 487; Arnold v. Richmond Iron Works, 1 Gray, 434; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 717. Proceedings to recover land of which a deed was made while the grantor was insane, which deed has not since been ratified or affirmed, may be

commenced without first restoring the consideration to the grantee: *Gibson v. Soper*, 6 Gray, 279.

4 *Burgess v. Pollock*, 53 Iowa, 273, 36 Am. Rep. 218.

5 *Gardner v. Gardner*, 22 Wend. 526, 34 Am. Dec. 340; *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220. Compare *Eaton v. Perry*, 29 Mo. 96; *Donelson v. Posey*, 13 Ala. 752.

6 *Van Wyck v. Brasher*, 81 N. Y. 260. See *Warnock v. Campbell*, 25 N. J. Eq. 485; *Freeman v. Statts*, 8 N. J. Eq. 814; *Belcher v. Belcher*, 10 Yerg. 121.

7 *Jarrett v. Jarrett*, 11 W. Va. 584; *Delaplain v. Grubb*, 44 W. Va. 612, 67 Am. St. Rep. 788.

8 *Jarrett v. Jarrett*, 11 W. Va. 584; *Delaplain v. Grubb*, 44 W. Va. 612; *Buckey v. Buckey*, 38 W. Va. 168.

9 *Shea v. Murphy*, 164 Ill. 614, 56 Am. St. Rep. 215; *Wilkinson v. Sherman*, 45 N. J. Eq. 413; and see *Moss v. Moss*, 78 Iowa, 645; *Boyer v. Berryman*, 123 Ind. 451; *Argo v. Coffin*, 142 Ill. 368, 34 Am. St. Rep. 86.

## § 286. Conveyances by Corporate Bodies.

Corporations may, through the intervention of agents, execute conveyances of their realty.<sup>1</sup> But where the mode in which the property of a corporation shall be conveyed is prescribed by the charter, or any general statute, that mode must be pursued.<sup>2</sup>

1 *Boone on Corporations*, sec. 54; *Leggett v. New Jersey Mfg. etc. Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728; *Central Gold Min. Co. v. Platt*, 3 Daly, 263; *Treadwell v. Salesbury Mfg. Co.*, 7 Gray, 393; *Bellows v. Todd*, 39 Iowa, 209; *Killingsworth v. Trust Co.*, 18 Or. 351, 17 Am. St. Rep. 737.

2 *Isham v. Bennington Iron Co.*, 19 Vt. 230; *Boone on Corporations*, sec. 54. See sec. 282, ante. As to sufficiency of execution of deeds by corporation, see *Railroad Co. v. Lancaster*, 62 Ala. 555; *Bason v. Mining Co.*, 90 N. C. 417; *Duke v. Markham*, 105 N. C. 131, 18 Am. St. Rep. 889.

**§ 287. Aliens as Parties to.**

Even at common law an alien may take real property by purchase,<sup>1</sup> and he may hold the same against all the world but the state.<sup>2</sup> And a conveyance by an alien who was once well seised of an indefeasible estate vests such estate in his grantee, subject only to be defeated by the state.<sup>3</sup> The constitution of the state of Washington (article 2, section 33) prohibits the ownership of lands by aliens in that state, except where acquired by inheritance, under mortgage, or in good faith in the ordinary course of justice in the collection of debts; and the provision does not apply to mineral lands, and the necessary land for mills and machinery for use in developing mines and in manufacturing their products. But every corporation, the majority of the capital stock of which is owned by aliens, is within the prohibition. And a lease of lands to an alien for the period of forty-nine years is held to be void under this constitutional provision.<sup>4</sup> But an alien holding lands in the state under a defeasible title, which is subject to attack on the part of the state as in contravention of the constitution, may by deed transfer a good title thereto to any person entitled to hold it, if no proceeding has been taken by the state for the purpose of setting aside the deed to the alien.<sup>5</sup>

<sup>1</sup> *Burk v. Brown*, 2 *Atk.* 399; *Elmendorf v. Carmichael*, 3 *Litt.* 472. 14 *Am. Dec.* 86; *Sands v. Lynham*, 27 *Gratt.* 291, 21 *Am. Rep.* 348; and see *sec. 19, ante*.

2 See secs. 19, 282, ante; *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430.

3 *Scanlan v. Wright*, 13 Pick. 523, 25 Am. Dec. 344. The disability of alienage has been removed by statute in many of the states: See sec. 19, ante; *Hall v. Hall*, 81 N. Y. 130; and, in England, alien friends are now enabled by statute to take and hold lands for residence or business for twenty-one years: Stats. 7 & 8 Vict., c. 66.

4 *State v. Hudson Land Co.*, 19 Wash. 85.

5 *Oregon Mort. Co. v. Carstens*, 16 Wash. 165.

### § 287a. Validity of, Generally.

A grantor cannot avoid his grant merely on the ground of his illiteracy and want of understanding of the terms used, if, when the grant was executed, it was read and explained to the grantor, and he fully understood its contents and terms.<sup>1</sup> The power of the legislature to validate deeds imperfect from mere informalities is unquestioned.<sup>2</sup>

1 *Bingham v. Salene*, 15 Or. 208, 3 Am. St. Rep. 152.

2 *Lindley v. O'Reilly*, 50 N. J. L. 636, 7 Am. St. Rep. 802.

### § 288. Effect of Duress on Deeds.

A deed executed under duress is not strictly void, but only voidable;<sup>1</sup> and a deed cannot be avoided on this ground except upon clear and conclusive evidence.<sup>2</sup> So in many cases it may be necessary for a party to move promptly in disaffirming the deed, or he may lose the right.<sup>3</sup> Actual violence is not necessary to constitute duress,<sup>4</sup> and moral compulsion, such as that pro-

duced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient to destroy free agency, without which there can be no contract.<sup>5</sup> But duress by mere advice, direction, influence, and persuasion is unknown to the law.<sup>6</sup> A mere threat to sue upon an agreement to convey in fee, whereby a conveyance of a lesser estate in the same land is procured, is not such duress as will avoid the conveyance.<sup>7</sup> If a party under duress promises to execute a deed for the purpose of regaining his liberty, and afterward, while at liberty, he performs his promise, it is nevertheless voidable.<sup>8</sup> To establish a ratification, it must appear that the duress or fear has ceased, which may not be until long after the threats are made.<sup>9</sup>

1 Worcester v. Eaton, 13 Mass. 377. 7 Am. Dec. 155; and see Edwards v. Handley, Hardin, 602. 3 Am. Dec. 745; Watkins v. Baird, 6 Mass. 506, 1 Am. Dec. 170; Deputy v. Stapleford, 19 Cal. 302.

2 Brown v. Peck, 2 Wis. 261; Davis v. Fox, 59 Mo. 125. The duress must have been at the instigation of the grantee: Talley v. Robinson, 22 Gratt. 888; Green v. Scranage, 19 Iowa, 461.

3 Murphy v. Paynter, 1 Dill. 333; Bazemore v. Freeman, 58 Ga. 276; Doolittle v. McCullough, 7 Ohio St. 299; Lyon v. Waldo, 36 Mich. 345.

4 Baker v. Morton, 12 Wall. 150; and see Radich v. Hutchins, 95 U. S. 210; Brumagim v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; Olivari v. Menger, 39 Tex. 76.

5 Baker v. Morton, 12 Wall. 150; Watkins v. Baird, 6 Mass. 506, 1 Am. Dec. 170; Miller v. Miller, 68 Pa. St. 486. A father may avoid a mortgage which he has been induced to sign by threats of the prosecution and

imprisonment of his son: *Harris v. Carmody*, 131 Mass. 51, 41 Am. Rep. 188.

6 *Barrett v. French*, 1 Conn. 354, 6 Am. Dec. 241; and see *Atlee v. Backhouse*, 3 Mees. & W. 642.

7 *Harris v. Tyson*, 24 Pa. St. 347, 64 Am. Dec. 661; and see *Snyder v. Braden*, 58 Ind. 143.

8 *Ormes v. Beadel*, 2 De Gex, F. & J. 333. Compare *Bissett v. Bissett*, 1 Har. & McH. 211.

9 *Taylor v. Jaques*, 106 Mass. 291. A deed made by an agent under duress may be avoided by the principal: *Cumming v. Ince*, 11 Q. B. 112. And it seems that a deed executed by a wife through duress of her husband may be avoided by her: *Brooks v. Berryhill*, 20 Ind. 97; *Kocourek v. Marak*, 54 Tex. 201, 38 Am. Rep. 623; *Eddie v. Slimmon*, 26 N. Y. 12; *Tapley v. Tapley*, 10 Minn. 458. Compare *Koehler v. Wilson*, 40 Iowa, 183; *McClintock v. Cummins*, 3 McLean, 158; *State v. Brantley*, 27 Ala. 44; *Remington v. Wright*, 43 N. J. L. 451; *Lefebvre v. Dutruit*, 51 Wis. 326, 37 Am. Rep. 833.

## § 289. Fraud and Undue Influence.

Fraud, when established, will vitiate any transaction, however solemn.<sup>1</sup> And it is a rule of universal application that whatever fraud creates, justice will destroy.<sup>2</sup> Fraud renders a deed absolutely void as against the party defrauded, and not voidable merely;<sup>3</sup> and a deed void in part for fraud is void in toto.<sup>4</sup> Where there is fraud in the execution of a deed, whereby it is rendered wholly void, the fraud may be taken advantage of in a court of law as well as in a court of equity.<sup>5</sup> But where the alleged fraud was only in obtaining the deed, or in the inducement to its execution, a court of equity alone can give relief.<sup>6</sup> Such courts are especially charged with the cog-

nizance of trust relations, such as subsist between trustee and beneficiary, parent and child, guardian and ward, etc.;<sup>7</sup> and a deed procured by undue influence, through an improper exercise of such relations, will be set aside.<sup>8</sup> In all cases of this kind, the court throws the burden of proof on the party who sets up the transaction against the person whom he was bound to protect,<sup>9</sup> and will insist upon a full and complete communication of all material circumstances.<sup>10</sup> Fair argument and persuasion, exerted for the purpose of obtaining a deed, will not have the effect to avoid its execution.<sup>11</sup>

1 Hall v. Irwin, 66 N. Y. 649; Jones v. Emery, 40 N. H. 348; Gage v. Gage, 29 N. H. 533; Somers v. Pumphrey, 24 Ind. 231; Laughton v. Harden, 68 Me. 208.

2 Vreeland v. New Jersey Stone Co., 29 N. J. Eq. 188. But no person will be allowed to allege his own fraud to avoid his own deed: Doe v. Roberts, 2 Barn. & Ald. 367; Walton v. Bonham, 24 Ala. 513.

3 Jackson v. Summerville, 13 Pa. St. 359; and see Miller's Appeal, 30 Pa. St. 478; Chess v. Chess, 1 Penr. & W. 32, 21 Am. Dec. 350; Butler v. Haskell, 4 Desaus. Eq. 707. A conveyance executed for a valuable and adequate consideration will be upheld against the creditors of the grantor, however fraudulent his purpose may have been, if the grantee had no knowledge thereof: Prewitt v. Wilson, 103 U. S. 22; Albertoli v. Branham, 80 Cal. 631, 13 Am. St. Rep. 200.

4 Thomas v. Thomas, 1 Litt. 62, 13 Am. Dec. 220; Young v. Pate, 4 Yerg. 164; Goodhue v. Berrien, 2 Sand. Ch. 630.

5 Thomas v. Thomas, 1 Litt. 62, 13 Am. Dec. 220; Hopkins v. Beard, 6 Cal. 664; Holley v. Younge, 27 Ala. 203; Stryker v. Vanderbilt, 25 N. J. L. 482; Es-



cherick v. Traver, 65 Ill. 379; and see Schuylkill County v. Copley, 67 Pa. St. 380; Van Deusen v. Sweet, 51 N. Y. 383.

6 Thomas v. Thomas, 1 Litt. 62, 13 Am. Dec. 220. Fraud as to the consideration cannot be inquired into in a court of law: Escherick v. Traver, 65 Ill. 379; Stryker v. Vanderbilt, 25 N. J. L. 482.

7 See Hogton v. Hogton, 15 Beav. 278; 1 Story's Equity Jurisprudence, sec. 322; Corbit v. Smith, 7 Iowa, 60; Bayliss v. Williams, 6 Cold. 440; Fuller v. Fuller, 40 Ala. 301; Turner v. Turner, 44 Mo. 535; Gilmore v. Burch, 7 Or. 374, 3 Am. Rep. 547.

8 Bayliss v. Williams, 6 Cold. 440; and see Jacox v. Jacox, 40 Mich. 473, 29 Am. Rep. 710; Darlington's Appeal, 86 Pa. St. 512, 27 Am. Rep. 726; Boyd v. De la Montagnie, 73 N. Y. 489, 29 Am. Rep. 197. The rule, that a party seeking to set aside a contract must place the opposite party in statu quo, has no application in the case of a deed which has been obtained by fraud and without consideration: Freeman v. Reagan, 26 Ark. 373; and see sec. 284, ante.

9 Harrison v. Guest, 6 De Gex, M. & G. 424; Berk-meyer v. Kellerman, 32 Ohio St. 239, 30 Am. Rep. 577.

10 Gordon v. Gordon, 3 Swanst. 41; Bergen v. Udall, 31 Barb. 25.

11 Taylor v. Taylor, 6 Ired. Eq. 124. Compare Bowles v. Watham, 54 Mo. 261; Hunter v. Walters, L. R. 7 Ch. App. 75. A bona fide purchaser from a fraudulent grantee will hold the estate at law against the original grantor: *Somes v. Brewer*, 2 Pick. 184, 13 Am. Dec. 406; *White v. Graves*, 107 Mass. 328, 9 Am. Rep. 38; *Wood v. Mann*, 1 Sum. 509.

### § 289a. Same—Continued.

If a conveyance is voluntary, and results in hindering, delaying, or defrauding creditors, it must be regarded as fraudulent in law, irrespective of what might have been actually passing in the grantor's mind.<sup>1</sup> It is held that a voluntary conveyance by one who is indebted raises a *prima*

facie presumption of fraud which becomes conclusive if the evidence fails to show that he had other property.<sup>2</sup> But a conveyance by one who is not indebted cannot be attacked as fraudulent by a subsequent debtor because it was voluntary.<sup>3</sup> So exempt property, being free from all claims of creditors, is not susceptible of fraudulent alienation, and the debtor may dispose of it as he sees fit.<sup>4</sup> So it is well settled that a conveyance to a wife in payment of a debt owing to her by her husband is not a voluntary conveyance, nor fraudulent with respect to his other creditors.<sup>5</sup> It has also been held that a conveyance made on the meritorious consideration of blood, or affection to a child, or as a settlement to a wife, is not as matter of law, fraudulent and void as to existing creditors, and that whether it is so or not depends upon all the circumstances of the transaction. If made when a person is deeply indebted, it furnishes prima facie evidence of fraud, but this may be rebutted, and the question of fraud is not, one of law, but of fact for the jury.<sup>6</sup> One who executes a deed to defraud creditors is estopped as to his grantee. The grantor in such case will not be heard to avoid his deed.<sup>7</sup> The conveyance is void only as to prior and existing creditors, and to those designed to be defrauded by the conveyance.<sup>8</sup> Nor can a grantor avoid his deed as fraudulent when he made it for the purpose of coercing a compromise with creditors, and with

the expectation of receiving a reconveyance when this purpose should be accomplished.<sup>9</sup> A deed executed by one free of debt, but concealed and not recorded, is fraudulent and void as to subsequent creditors of the grantor.<sup>10</sup> If a conveyance is made for the payment or security of several debts, some valid and others fraudulent, and the parts are clearly severable, it will be sustained as to those creditors holding valid claims.<sup>11</sup> A deed from a father to one daughter, to the exclusion of another, is not constructively void.<sup>12</sup> Undue influence, to render a deed void, must be of a character to deprive the grantor of free agency.<sup>13</sup> And a deed, even if made under undue influence, is not absolutely void, but is only voidable.<sup>14</sup> Statements made by a grantor are inadmissible in evidence to impeach his deed. A person having executed a deed cannot invalidate it by any parol declarations he may make.<sup>15</sup>

1 Marmon v. Harwood, 124 Ill. 104, 7 Am. St. Rep. 345. See sec. 292, post.

2 Norton v. McNutt, 55 Ark. 59; and see Fetters v. Duvernois, 73 Mich. 481; Marshall v. Roll, 139 Pa. St. 399, 23 Am. St. Rep. 198; Holliday v. Miller, 29 W. Va. 424, 6 Am. St. Rep. 653.

3 Stix v. Chaytor, 55 Ark. 116; and see Brundage v. Cheneworth, 101 Iowa, 256, 63 Am. St. Rep. 382.

4 Blair v. Smith, 114 Ind. 114, 5 Am. St. Rep. 593; Sims v. Phillips, 54 Ark. 193; Union Pac. R. R. Co. v. Smersh, 22 Neb. 751, 3 Am. St. Rep. 290.

5 Gibson v. Bennett, 79 Me. 302; Meigs v. Dibble, 73 Mich. 101; Heath v. Slocum, 115 Pa. St. 549.

6 Cook v. Holbrook, 146 Mass. 66. Compare Dixon v. Sanderson, 72 Tex. 359, 13 Am. St. Rep. 801; Helms v.

Green, 105 N. C. 251, 18 Am. St. Rep. 893; Burt v. Timmons, 29 W. Va. 441, 6 Am. St. Rep. 664; Bronson v. Vaughan, 44 W. Va. 406; and cases cited, *supra*. See, also, Poulson v. Stanley, 122 Cal. 655, 68 Am. St. Rep. 73; Emmons v. Barton, 109 Cal. 662.

7 Peterson v. Brown, 17 Nev. 172, 45 Am. Rep. 437; Williams v. Clink, 90 Mich. 297, 30 Am. St. Rep. 443; Davy v. Kelley, 66 Wis. 452; Bush v. Rogan, 65 Ga. 320, 38 Am. Rep. 785; and see Arnold v. Hagerman, 45 N. J. Eq. 186, 14 Am. St. Rep. 712.

8 Voorhis v. Michaelis, 45 Kan. 255.

9 Moore v. Jordan, 65 Miss. 229, 7 Am. St. Rep. 641.

10 Steele v. Coon, 27 Neb. 586, 20 Am. St. Rep. 705; and see Fetters v. Duvernois, 73 Mich. 481; Stock Growers' Bank v. Newton, 13 Colo. 245.

11 Victor v. Glover, 17 Wash. 37.

12 Wessell v. Rathjohn, 89 N. C. 377, 45 Am. Rep. 696.

13 Roe v. Taylor, 45 Ill. 491; Shea v. Murphy, 164 Ill. 614, 56 Am. St. Rep. 215; and see Slayback v. Witt, 151 Ind. 376; Delaplain v. Grubb, 44 W. Va. 612, 67 Am. St. Rep. 788.

14 Burt v. Quisenberry, 132 Ill. 385, 403.

15 Nicewander v. Nicewander, 151 Ill. 156; Shea v. Murphy, 164 Ill. 614, 56 Am. St. Rep. 215. See sec. 292, *post*.

## § 290. Names of Parties.

It is one of the requisites of a good deed that the parties thereto be truly and sufficiently described.<sup>1</sup> But it is not absolutely necessary to name the grantee, if he be described or designated in some way so as to be distinguished from all others.<sup>2</sup> A deed that does not in any way designate the grantee,<sup>3</sup> or a deed to a fictitious person, passes no title.<sup>4</sup> The omission or insertion of a middle name or its initial is immaterial;<sup>5</sup> and a mistake in the Christian name, if the deed

son v. Sisson, 2 Johns. Cas. 321; sec. 282, ante. Compare Foster v. Lane, 30 N. H. 305; Reformed Church v. Veeder, 4 Wend. 494.

16 Den v. Hay, 1 N. J. L. 174; and see Scanlan v. Wright, 13 Pick. 523, 25 Am. Dec. 344.

### § 290a. Same—Continued.

A deed made to a married woman in her maiden name is valid if clearly shown to have been intended for her.<sup>1</sup> So, generally, if a person is in existence, and ascertained, a conveyance to or by him by a fictitious name passes title.<sup>2</sup> One who accepts a conveyance in which his name is not correctly stated or spelled is deemed to have adopted that name for the purpose of acquiring and holding title to the property.<sup>3</sup> And a party who recognizes the validity of a deed made without his knowledge or consent thereby becomes a party to and is bound by it.<sup>4</sup> A deed to a man who is dead at the time of its execution is a nullity.<sup>5</sup> So a deed to the heirs of a living person, to take effect immediately, is held to be void for uncertainty, in the absence of words showing that the grantor intended the term "heirs" to mean "children."<sup>6</sup> If the name of a grantor in a deed and in the patent to land is the same, and the land conveyed is identical, the proof of identity of person is prima facie sufficient, though the residence recited in the patent is different from that recited in the deed.<sup>7</sup>

1 Wilkerson v. Schoomaker, 77 Tex. 615, 19 Am. St. Rep. 803.

2 *Wilson v. White*, 84 Cal. 239; and see, as sustaining this rule, *Fallon v. Kehoe*, 38 Cal. 44, 99 Am. Dec. 347; *Wakefield v. Brown*, 38 Minn. 365, 8 Am. St. Rep. 675; *Weihl v. Robertson*, 97 Tenn. 465; *Andrews v. Dyer*, 81 Me. 104.

3 *Blinn v. Chessman*, 49 Minn. 140, 32 Am. St. Rep. 536; and see *Salmer v. Lathrop*, 10 S. Dak. 216.

4 *Huffman v. Mulkey*, 78 Tex. 556, 22 Am. St. Rep. 71; and see *Crowley v. Lumber Co.*, 66 Minn. 400.

5 *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; and so, to same effect, *Morgan v. Hazlehurst Lodge*, 53 Miss. 675. Compare *Neal v. Nelson*, 117 N. C. 393, 53 Am. St. Rep. 590.

6 *Booker v. Tarwater*, 138 Ind. 385; *Tinder v. Tinder*, 131 Ind. 381. See *Fountain etc. Min. Co. v. Beckleheimer*, 102 Ind. 76, 52 Am. Rep. 645.

7 *Geer v. Mining Co.*, 134 Mo. 85, 56 Am. St. Rep. 489.

## § 291. Date.

It is the common and correct practice to insert a date in a deed, as indicating the time of its execution and delivery.<sup>1</sup> But the date is no part of the substance of the deed, and the presumption that the deed was delivered and took effect on the day of its date<sup>2</sup> may be rebutted, and the true time of the delivery shown by competent evidence.<sup>3</sup> Where the date in the body of a deed was exactly one year prior to the date at the foot thereof, the latter was held to be the true date of the execution of the deed.<sup>4</sup>

1 *Osbourn v. Rider*, Cro. Jac. 135; *M'Kinney v. Rhodes*, 5 Watts, 343; *County of Henry v. Bradshaw*, 20 Iowa, 355; *Woodman v. Smith*, 37 Me. 25; *Blake v. Fash*, 44 Ill. 302.

2 *Lee v. Insurance Co.*, 6 Mass. 219; *Breckenridge v. Todd*, 3 T. B. Mon. 52, 16 Am. Dec. 83; *Gardiner v. Collins*, 3 Mason, 398; *Banning v. Edes*, 6 Minn. 402;

Meech v. Fowler, 14 Ark. 29; Faulkner v. Adams, 126 Ind. 459; Cover v. Manaway, 115 Pa. St. 338, 2 Am. St. Rep. 552; McFarlane v. Loudon, 99 Wis. 620, 67 Am. St. Rep. 883; Lewis v. Burns, 122 Cal. 358.

3 Sweetzer v. Lowell, 33 Me. 446; Harris v. Norton, 16 Barb. 264; Genter v. Morrison, 31 Barb. 155.

4 Morrison v. Caldwell, 5 T. B. Mon. 426; and see Colquhoun v. Atkinson, 6 Munf. 550. A date in figures would seem to be less regarded than one in a different form: Jackson v. Schoonmaker, 2 Johns. 233.

### § 292. Consideration.

A consideration is usually stated to be one of the essentials of a good deed.<sup>1</sup> But a deed entered into without any consideration is valid and effectual at law as between the parties,<sup>2</sup> and it cannot be avoided by the grantor if he should become dissatisfied with the transaction.<sup>3</sup> The law regards it as his own folly to have made such a conveyance, and leaves him to bear the consequences without means of redress.<sup>4</sup> The consideration of a deed may be either good or valuable,<sup>5</sup> but it must not be against the policy of the law, the principles of justice, or the rules of morality.<sup>6</sup> A good consideration is founded upon natural love and affection between near blood relations;<sup>7</sup> such, for instance, as subsists between parent and child,<sup>8</sup> or between a grandparent and grandchild.<sup>9</sup> And a deed from husband to wife, "for natural love and affection," was held to vest the title, as between the parties, in the wife.<sup>10</sup> Deeds made upon good consideration only are regarded as merely voluntary,<sup>11</sup> and if the intent and purpose

was to defraud, they are void as against creditors and subsequent bona fide grantees for value;<sup>12</sup> but valid and effectual as to the grantor and his heirs, and all other persons claiming under him in privity of estate with notice of the fraud.<sup>13</sup> A valuable consideration is one founded on something deemed valuable, as money, goods, services, or the like, which the law esteems an equivalent given for the grant.<sup>14</sup> Marriage is also a valuable consideration;<sup>15</sup> so of support and maintenance;<sup>16</sup> and the receipt and use by the husband of the wife's property is a sufficient consideration for the conveyance of land to her use;<sup>17</sup> so a precedent debt constitutes a valuable consideration for a deed;<sup>18</sup> and the seduction of an innocent woman by a pretended marriage is a valuable consideration for a deed subsequently made to her and her children.<sup>19</sup> It is not essential that a consideration be expressed in the deed,<sup>20</sup> and if it becomes necessary to prove one, it may be shown by parol.<sup>21</sup> So, in general, the consideration clause in a deed is not within the rule excluding parol evidence in contradiction of a writing.<sup>22</sup> Its effect is to estop the grantor from alleging that the deed was executed without consideration, and thereby avoiding it;<sup>23</sup> but for every other purpose it is open to explanation, and may be varied by parol proof.<sup>24</sup> A deed of gift from an ancestor is supported alone by a consideration of blood or marriage, but a deed for a con-



sideration other than blood, that is, a valuable consideration, is a purchase.<sup>25</sup>

1 See 4 Kent's Commentaries, 462; 2 Greenleaf's Cruise on Real Property, 121, 122; Life Ins. Co. v. Cole, 4 Fla. 359; Chiles v. Coleman, 2 A. K. Marsh. 296, 12 Am. Dec. 396. Equity will not lend its aid to carry a deed into execution unless it is supported by some consideration: Osgood v. Strode, 1 Ves. Jr. 54; 2 P. Wms. 245; Acker v. Phoenix, 4 Paige, 305; Bunn v. Wintrop, 1 Johns. Ch. 336; Story's Equity Jurisprudence, 793.

2 Rogers v. Hillhouse, 3 Conn. 398; Den v. Hawks, 5 Ired. 30; Cathcart v. Robinson, 5 Pet. 264; Miller v. Marckle, 21 Ill. 152; Campbell v. Whitson, 68 Ill. 240, 18 Am. Rep. 553; Laberee v. Carleton, 53 Me. 211; Brown v. Whaley, 58 Ohio St. 654, 65 Am. St. Rep. 793.

3 Green v. Thomas, 11 Me. 318; Ryan v. Brown, 18 Mich. 196; Prescott v. Hayes, 43 N. H. 593; Doe v. Hurd, 7 Blackf. 510.

4 Campbell v. Whitson, 68 Ill. 240, 18 Am. Rep. 553; Taylor v. King, 6 Munf. 358.

5 4 Kent's Commentaries, 464; 2 Greenleaf's Cruise on Real Property, 323; Potter v. Gracie, 58 Ala. 303, 29 Am. Rep. 748.

6 Hubert v. Maze, 2 Bos. & P. 371; Florentine v. Wilson, Hill & D. 303; Bank of United States v. Owens, 2 Pet. 527; Potter v. Gracie, 58 Ala. 303, 29 Am. Rep. 748; and see Walker v. Gregory, 36 Ala. 180; Walraven v. Jones, 1 Houst. 355; Toler v. Armstrong, 4 Wash. 297; 11 Wheat. 258; Insurance Co. v. Grim, 32 Ind. 249, 2 Am. Rep. 341.

7 4 Kent's Commentaries, 464; and see Eckman v. Eckman, 68 Pa. St. 460; Hanson v. Buckner, 4 Dana, 251; Randall v. Ghent, 19 Ind. 271.

8 Pierson v. Armstrong, 1 Iowa, 282, 63 Am. Dec. 440; Fennessey v. Fennessey, 84 Ky. 519, 4 Am. St. Rep. 210.

9 Stoyall v. Barnett, 4 Litt. 207; Huss v. Stephens, 51 Pa. St. 282. Compare Borum v. King, 37 Ala. 606; Powell v. Morisey, 98 N. C. 426, 2 Am. St. Rep. 343. But not between parent and illegitimate child: Blount v. Blount, 2 L. R. (N. C.) 587; and see Cains v. Jones, 5 Yerg. 249.

10 *Stafford v. Stafford*, 41 Tex. 111.

11 *Washband v. Washband*, 27 Conn. 424.

12 *Rockhill v. Spraggs*, 9 Ind. 32, 68 Am. Dec. 607; *Dunlap v. Hawkins*, 59 N. Y. 340; *Beal v. Warren*, 2 Gray, 447; *Babcock v. Eckler*, 24 N. Y. 623; *Cathcart v. Robinson*, 5 Pet. 264; *Bongars v. Block*, 81 Ill. 186, 25 Am. Rep. 276; *Campbell v. Whitson*, 68 Ill. 240, 18 Am. Rep. 553. It is the settled law of Alabama that a voluntary conveyance is absolutely void as to the existing creditors of the grantor, and no inquiry is indulged into the intent with which it is made: *Potter v. Gracie*, 58 Ala. 303, 29 Am. Rep. 748. The intent is held to be material only when the rights of subsequent creditors are involved; then, if it is tainted with actual fraud, it is void: *Potter v. Gracie*, 58 Ala. 303, 29 Am. Rep. 748. Compare *Crawford v. Kirksey*, 55 Ala. 282, 28 Am. Rep. 704; *Claffin v. Mess*, 30 N. J. Eq. 211; *Budd v. Atkinson*, 30 N. J. Eq. 530; *Hagerman v. Buchanan*, 45 N. J. Eq. 292, 14 Am. St. Rep. 732; *Keep v. Keep*, 7 Abb. N. C. 240.

13 *Miller v. Marckle*, 21 Ill. 152; *Campbell v. Whitson*, 68 Ill. 240, 18 Am. Rep. 555; *Walker v. Gregory*, 36 Ala. 180; *Potter v. Gracie*, 58 Ala. 303, 29 Am. Rep. 748; *Story's Equity Jurisprudence*, sec. 371. See sec. 289a, ante.

14 2 *Blackstone's Commentaries*, 296; *Ellinger v. Crowl*, 17 Md. 361; *Seward v. Jackson*, 8 Cow. 406; *Brown v. Whaley*, 58 Ohio St. 654, 65 Am. St. Rep. 793.

15 *Thompson v. Thompson*, 17 Ohio St. 649; *Ellinger v. Crowl*, 17 Md. 361; *Conner v. Stanley*, 65 Cal. 183; *Gibson v. Bennett*, 79 Me. 302; *Prignon v. Daussat*, 4 Wash. 199, 31 Am. St. Rep. 914; *Tolman v. Ward*, 86 Me. 303, 41 Am. St. Rep. 556; *Cohen v. Knox*, 90 Cal. 266; *Herring v. Wickham*, 29 Gratt. 628, 26 Am. Rep. 405; *Andrews v. Jones*, 10 Ala. 400; *Jones' Appeal*, 62 Pa. St. 324; *Prewit v. Wilson*, 103 U. S. 22. And a mere voluntary deed is made good and effectual by a subsequent marriage: *Sterry v. Arden*, 1 Johns. Ch. 271; *Verplank v. Sterry*, 12 Johns. 536; *Smith v. Allen*, 5 Allen, 458.

16 *Shontz v. Brown*, 27 Pa. St. 123; *Camp v. Gifford*, 67 Barb. 434; *McGill v. Woodward*, 1 Tread. 408; *Furlong v. Sanford*, 87 Va. 506; and compare *Spaulding v.*

Hollenbeck, 30 Barb. 202; Hutchinson v. Hutchinson, 46 Me. 154; Sanders v. Wagonseller, 19 Pa. St. 248. See Grimmer v. Carlton, 93 Cal. 189, 27 Am. St. Rep. 171.

17 Hill v. West, 8 Ohio, 222.

18 McMahan v. Morrison, 16 Ind. 172; and see Busey v. Reese, 38 Md. 264.

19 Doe v. Horn, 1 Ind. 363, 50 Am. Dec. 470; and see Herring v. Wickham, 29 Gratt. 628, 26 Am. Rep. 405. But where the grantees were respectively the mistress and the illegitimate child of the grantor, and the deed recited that it was made on divers good considerations, and for kindness felt by the grantor toward the grantees, parol evidence was held to be inadmissible to prove a valuable consideration; and that, although intended as a provision for the maintenance of the grantees, and not in consideration of future cohabitation, the deed was void as to existing creditors of the grantor: Potter v. Gracie, 58 Ala. 303, 29 Am. Rep. 748.

20 Cunningham v. Freeborn, 11 Wend. 248; Jackson v. Dillon, 2 Over. 261. In Kansas, an instrument in form a conveyance, whether under seal or not, and duly signed by the grantor, imports a consideration: Ruth v. King, 9 Kan. 17.

21 Wood v. Beach, 7 Vt. 522; Jackson v. Pike, 9 Cow. 69; and see Jack v. Dougherty, 3 Watts, 151; Redfield etc. Mfg. Co. v. Dysart, 62 Pa. St. 62.

22 McCrea v. Purmort, 16 Wend. 460, 30 Am. Dec. 103; Bennett v. Solomon, 6 Cal. 137; Rhine v. Ellen, 36 Cal. 371; Hannran v. Oxley, 23 Wis. 519; Kickland v. Wooden Ware Co., 68 Wis. 34, 60 Am. Rep. 831; Clapp v. Tirrell, 20 Pick. 250; Morris v. Tillson, 81 Ill. 616; Ingersoll v. Truebody, 40 Cal. 610; Higgins v. Higgins, 46 Cal. 263; Leach v. Shelby, 58 Miss. 689; Bolles v. Sachs, 37 Minn. 318; Byers v. Locke, 93 Cal. 493, 27 Am. St. Rep. 212; Fort v. Richey, 128 Ill. 502; Michael v. Foil, 100 N. C. 178, 6 Am. St. Rep. 577; Tolman v. Ward, 86 Me. 303, 41 Am. St. Rep. 556.

23 Adams v. Hull, 2 Denio, 306; Anthony v. Harrison, 14 Hun, 210; Bryant v. Hunter, 6 Bush, 75; Goodspeed v. Fuller, 46 Me. 141; Goward v. Waters, 98 Mass. 599.

24 Stackpole v. Robbins, 47 Barb. 210; 48 N. Y. 665; Hebbard v. Haughian, 70 N. Y. 54; and see Henderson v. Fullerton, 54 How. Pr. 425; Sanford v. Sanford, 5

Lans. 493; 61 Barb. 302; Bassett v. Bassett, 55 Me. 127; Johnson v. Boyles, 26 Ala. 576; Peck v. Vandenberg, 30 Cal. 57; Kintner v. Jones, 122 Ind. 148. Contra, Salisbury v. Clarke, 61 Vt. 453. A deed executed by a party in whom title is vested, expressing a valuable consideration, need not be supported by showing what other reason, in addition to the will of the party, led to its execution: Rockwell v. Brown, 54 N. Y. 210. Compare Games v. Stiles, 14 Pet. 322.

25 Brown v. Whaley, 58 Ohio St. 654, 65 Am. St. Rep. 793.

### § 292a. Same—Continued.

A deed executed and delivered in consideration of future illicit intercourse, the grantees being in possession, vests title. The maxim, *In pari delicto potior est conditio possidentis*, applies in such case.<sup>1</sup> The bona fide assumption of liability by the surety for the debt of his insolvent grantor is a valuable consideration for a deed.<sup>2</sup> But a debt due from a father to his child as guardian does not constitute a consideration for a deed from the father to the child, so as to make the child a purchaser for value, and not a volunteer, in the absence of any consent by the child or sanction by the probate court to such an application of the debt.<sup>3</sup> So a promise by a father to the mother on her deathbed that their child should have certain property creates a mere moral obligation, and does not constitute a valuable consideration for a deed of the property from the father to the child.<sup>4</sup> Mere inadequacy of consideration is not alone sufficient to warrant a court in setting aside a sale and a conveyance made in pursuance there-

of.<sup>5</sup> And a conveyance will not be set aside as for a failure of consideration, in the absence of fraud, on the sole ground that the promises and agreements which enter into its execution, and which by the terms of the contract under which a deed is made were not to be performed until after its execution, have not been performed.<sup>6</sup> When a deed is executed upon a good and valid consideration, the transaction is complete, and the deed will be unaffected by anything that may thereafter happen. Hence, where a grantee, at the time of the execution of a deed to her, in consideration of her promise to marry the grantor, is unaware of the intention of the grantor to defraud his creditors, the fact that she becomes aware of such fraudulent intent before she complies with her contract of marriage is not sufficient to avoid the deed, since the consideration therefor is the agreement to marry, and not its actual consummation.<sup>7</sup> A deed made and delivered by a parent to his minor child for the purpose of making provision for such child has a meritorious consideration which entitles it to the protection of a court of equity.<sup>8</sup>

1 Hill v. Freeman, 73 Ala. 200, 49 Am. Rep. 48; and so, to same effect, Gisaf v. Neval, 81 Pa. St. 356; Marksbury v. Taylor, 10 Bush, 519; Ayerst v. Jenkins, L. R. 16 Eq. 275.

2 Mobile Sav. Bank v. McDonnell, 89 Ala. 434, 18 Am. St. Rep. 137.

3 Peck v. Peck, 77 Cal. 106, 11 Am. St. Rep. 244.

4 *Peck v. Peck*, 77 Cal. 106, 11 Am. St. Rep. 244; and see *Lloyd v. Fulton*, 91 U. S. 484.

5 *Hammond v. Wallace*, 85 Cal. 522, 20 Am. St. Rep. 239; and see *Manufacturing Co. v. Beyer*, 74 Wis. 210, 17 Am. St. Rep. 131.

6 *Lawrence v. Gayetty* 78 Cal. 126, 12 Am. St. Rep. 29.

7 *Prignon v. Daussat*, 4 Wash. 199, 31 Am. St. Rep. 914.

8 *Hutsell v. Crewse*, 138 Mo. 1.

### § 293. Signing and Sealing.

It is another requisite of a good deed that it must be signed and sealed by the party whose deed it is;<sup>1</sup> though, if sealed and delivered, it seems that signing is not necessary, unless in cases under the statute of frauds, and deeds executed under powers.<sup>2</sup> Execution by the grantee, when the deed contains no engagement on his part, serves no other purpose than to show his assent to the grant;<sup>3</sup> and such assent, in the absence of evidence to the contrary, is always presumed.<sup>4</sup> There can be no deed without a seal,<sup>5</sup> and by a seal at common law is meant "an impression upon wax or wafer, or some other tenacious substance capable of being impressed."<sup>6</sup> A scrawl with a pen is not a seal within the meaning of the law.<sup>7</sup> And a slit in a parchment, with a ribbon through it, will not make a seal.<sup>8</sup> But a seal in the United States is becoming more and more regarded as a mere formality;<sup>9</sup> and in some of the states a scrawl, with or without the letters "L. S." or the word "seal" within it, serves instead of the com-

mon-law seal.<sup>10</sup> In other states an impression on the paper only, without wax or wafer, is sufficient.<sup>11</sup> Several persons may bind themselves by one seal.<sup>12</sup> The seal of a corporation should be affixed by the officer to whom the custody of it is confided.<sup>13</sup>

1 2 Blackstone's Commentaries, 306; McDill v. McDill, 1 Dall. 64; Smith v. Evans, 1 Wils. 213; Chiles v. Conley, 2 Dana, 21; Clark v. Graham, 6 Wheat. 579.

2 Wright v. Wakeford, 17 Ves. 459; and see Sicard v. Davis, 6 Pet. 124; Mutual Ben. Life Ins. Co. v. Brown, 30 N. J. Eq. 193. But compare Ellis v. Smith, 1 Ves. Jr. 13.

3 Burton on Real Property, sec. 441.

4 Burton on Real Property, sec. 441; Thompson v. Leach, 2 Vent. 198; Alfred v. Lea, Cro. Eliz. 54; Tibbals v. Jacobs, 31 Conn. 428; Mitchell v. Ryan, 3 Ohio St. 377.

5 See Taylor v. Glaser, 2 Serg. & R. 502; Elwell v. Shaw, 16 Mass. 47; Jackson v. Wood, 12 Johns. 73; Deming v. Bullitt, 1 Blackf. 241; Chine v. Black, 4 McCord, 431; Barrett v. Hinckley, 124 Ill. 32, 7 Am. St. Rep. 331. A seal is not necessary to the validity of a deed in Iowa: Swartz v. Ballou, 47 Iowa, 188, 29 Am. Rep. 470; so in Nebraska: Brown v. Westerfield, 47 Neb. 399, 53 Am. St. Rep. 532; and Texas: Sanger v. Warren, 91 Tex. 472, 66 Am. St. Rep. 913; and see Ruth v. King, 9 Kan. 17; Shelton v. Armor, 13 Ala. 647. Nor was a seal requisite under the civil law: See Stanley v. Green, 12 Cal. 166.

6 4 Kent's Commentaries, 452; Warren v. Lynch, 5 Johns. 245; Perrine v. Cheeseman, 11 N. J. L. 174, 19 Am. Rep. 388; Tasker v. Bartlett, 5 Cush. 359; and see Adams v. Kerr, 1 Bos. & P. 360. An instrument will be treated as sealed where evidence of the intent to affix a seal is clear: McCarley v. Tippah County Supervisors, 58 Miss. 483, 38 Am. Rep. 338; but not merely because it contains a recital that it is sealed: McCarley v. Tippah County Supervisors, 58 Miss. 749.

7 Warren v. Lynch, 5 Johns. 245.

8 *Duncan v. Duncan*, 1 Watts, 322.

9 See *Ortman v. Dixon*, 13 Cal. 36; *Marling v. Marling*, 9 W. Va. 79, 27 Am. Rep. 535; *Ashwell v. Ayres*, 4 Gratt. 283; *Le Franc v. Richmond*, 5 Saw. 603.

10 See *Comerford v. Cobb*, 2 Fla. 418; *Michener v. Kenny*, Wright, 459; *McRaven v. McGuire*, 9 Smedes & M. 34; *Long v. Ramsey*, 1 Serg. & R. 72; *United States v. Coffin*, Bee, 140; *Connolly v. Goodwin*, 5 Cal. 220; *Burton v. Le Roy*, 5 Saw. 510; *Lewis v. Overby*, 28 Gratt. 627; *Boone on Corporations*, sec. 50.

11 See *Pillow v. Roberts*, 13 How. 473; *Carter v. Burley*, 9 N. H. 558. In New York, an impression on the paper is not a seal, except in case of public officers and courts: *Farmers' etc. Bank v. Haight*, 3 Hill, 493.

12 *Mackay v. Bloodgood*, 9 Johns. 285; *Lambden v. Sharp*, 9 Humph. 224; *Davis v. Burton*, 3 Scam. 144; *Townsend v. Hubbard*, 4 Hill, 351; *Bradford v. Randall*, 5 Pick. 496.

13 *Jackson v. Campbell*, 5 Wend. 575; and see *Boone on Corporations*, sec. 50.

### § 293a. Same—Continued.

The signing of a deed by one not described therein as a grantor is held to be wholly inoperative.<sup>1</sup> A conveyance to which the signature of the grantor is affixed by another at the grantor's direction, in his presence, or which, though not so affixed, is subsequently adopted and ratified by the grantor, is valid, and the instrument is as effective as if signed by himself.<sup>2</sup> And the acknowledgment of a deed by a grantor who did not himself sign it is a sufficient recognition and adoption of the signature.<sup>3</sup> If a deed is made by "A. B., executor," and is signed by him in the same form, it sufficiently appears that it was made by him in his representative capacity.<sup>4</sup>



When a grantee accepts a deed, and goes into possession under it, he is bound by the conditions contained therein as effectively as if he had signed and sealed the instrument.<sup>5</sup> Although an instrument unsealed may not convey the legal title to land, it at least conveys the equitable title.<sup>6</sup> And the accidental omission of a seal from a deed does not affect its validity.<sup>7</sup>

1 Stone v. Sledge, 87 Tex. 49, 47 Am. St. Rep. 65; Harrison v. Simons, 55 Ala. 510. See sec. 290, ante.

2 Blaisdell v. Leach, 101 Cal. 405, 40 Am. St. Rep. 65; Bartlett v. Drake, 100 Mass. 174, 1 Am. Rep. 101, 97 Am. Dec. 92; Kennedy v. Gramling, 33 S. C. 367, 26 Am. St. Rep. 676; Lovejoy v. Richardson, 68 Me. 386.

3 Lewis v. Watson, 98 Ala. 479, 39 Am. St. Rep. 82; Clough v. Clough, 73 Me. 487, 40 Am. Rep. 386.

4 Babcock v. Collins, 60 Minn. 73, 51 Am. St. Rep. 503.

5 Hickey v. Railway Co., 51 Ohio St. 40, 46 Am. St. Rep. 545; and see Georgia etc. R. R. Co. v. Reeves, 64 Ga. 492; Burbank v. Pillsbury, 48 N. H. 475, 97 Am. Dec. 633; Countryman v. Deck, 13 Abb. N. C. 110.

6 Jewell v. Harding, 72 Me. 124; Dreutzer v. Baker, 60 Wis. 179; Frost v. Wolf, 77 Tex. 455, 19 Am. St. Rep. 761.

7 Heyward v. Mining Co., 42 S. C. 138, 46 Am. St. Rep. 702; Mee v. Benedict, 98 Mich. 260, 39 Am. St. Rep. 543.

## § 294. Execution by Attorney.

The grantor may appoint another to be his agent or attorney to sign and seal the deed for him.<sup>1</sup> But in order to give validity to a deed executed by an agent or attorney, it is an indispensable requisite that it should be done in the name of the principal.<sup>2</sup> It must appear from the

body of the deed that the principal is the grantor, and the deed must be signed with his name, and purport to be sealed with his seal.<sup>3</sup> The deed in some part must also show that its execution by the principal was done by the agent or attorney named.<sup>4</sup> In Maine, where a deed is executed by an agent or attorney, with authority therefor, and it appears by the deed that it was the intention of the parties to bind the principal, it must be regarded as the deed of the principal, though signed by the agent or attorney in his own name.<sup>5</sup> So, in Massachusetts and New Hampshire, lands belonging to the state may be conveyed by deed of authorized public agents in their own names as such;<sup>6</sup> and so of lands belonging to towns in the latter state.<sup>7</sup> Authority to the agent to execute a deed in behalf of his principal need not be given in express terms, but may be implied from the express power to sell;<sup>8</sup> the power to sell the lands of the principal necessarily implies and carries with it the power to execute a proper deed to carry the sale into effect.<sup>9</sup> A recorded power of attorney to convey certain lands remains in force, as to purchasers in good faith, without notice, from the attorney, though the grantor himself in the meantime conveys the same lands by a deed which remains unrecorded.<sup>10</sup>

1 *Ball v. Dunsterville*, 4 Term Rep. 313; *Rex v. Longnor*, 1 Nev. & M. 576; and see *Bartlett v. Drake*, 100 Mass. 174, 1 Am. Rep. 101.

2 *Elwell v. Shaw*, 16 Mass. 42, 8 Am. Dec. 126; *Brinley v. Mann*, 2 Cush. 337, 48 Am. Dec. 669; *Stinchfield*

v. Little, 1 Me. 231, 10 Am. Dec. 65; Shanks v. Lancaster, 5 Gratt. 110, 50 Am. Dec. 108; McDonald v. Bear River Co., 13 Cal. 235; Meagher v. Thompson, 49 Cal. 189; Berkeley v. Hardy, 8 Dowl. & R. 102.

3 Carter v. Chandron, 21 Ala. 72; Barger v. Miller, 4 Wash. C. C. 280; Providence v. Miller, 11 R. I. 272, 23 Am. Rep. 453.

4 Wood v. Goodridge, 6 Cush. 117, 52 Am. Dec. 771; Butterfield v. Beall, 3 Ind. 203; Hunter v. Miller, 6 B. Mon. 612; Thurman v. Cameron, 24 Wend. 90; and see McClure v. Herring, 70 Mo. 18, 35 Am. Rep. 404; Carpenter v. Farnsworth, 106 Mass. 561, 8 Am. Rep. 360; Haile v. Peirce, 32 Md. 327, 3 Am. Rep. 139; Doe v. Blacker, 27 Ga. 418; Northwestern Distilling Co. v. Brant, 69 Ill. 658, 18 Am. Rep. 631.

5 Inhabitants etc. v. Clark, 68 Me. 87, 28 Am. Rep. 22.

6 Ward v. Bartholomew, 6 Pick. 409; Thompson v. Carr, 5 N. H. 510; Magill v. Hinsdale, 6 Conn. 465, 16 Am. Dec. 70.

7 Cofran v. Cockran, 5 N. H. 488.

8 Inhabitants v. Clark. 68 Me. 87, 28 Am. Rep. 22.

9 Valentine v. Piper, 22 Pick. 85, 33 Am. Dec. 715; Marr v. Given, 23 Me. 55, 39 Am. Dec. 600. The death of the principal revokes the authority to execute a deed: Harper v. Little, 2 Me. 14, 11 Am. Dec. 25.

10 Gratz v. Improvement Co., 82 Fed. Rep. 381; 27 C. C. A. 305.

## § 295. Delivery of.

A good delivery is essential to give effect to a deed, whether it be a conveyance founded upon a valuable consideration or a mere voluntary conveyance.<sup>1</sup> A deed takes effect from the time of its delivery, and not from the time of the date;<sup>2</sup> though the date is presumptively the true time of its execution and delivery.<sup>3</sup> Without a delivery on the part of the grantor, which act is the

consummation of the conveyance, all the preceding formalities are unavailable to impart validity to it as a solemn instrument of title.<sup>4</sup> And a valid deed once delivered cannot be defeated by any subsequent act, unless by virtue of a condition in the deed itself.<sup>5</sup> A complete delivery of a deed requires its acceptance by the grantee,<sup>6</sup> but such acceptance is always presumed, if the deed is found in the grantee's hands.<sup>7</sup> No set formulary of words or acts is necessary to a valid delivery;<sup>8</sup> it may be done by acts or words, or by both combined;<sup>9</sup> by the grantor himself, or by another by the grantor's authority precedent or assent subsequent;<sup>10</sup> and it may be made to the grantee personally, or to another authorized by the grantee to accept it,<sup>11</sup> or to a stranger with a subsequent ratification.<sup>12</sup> And it is immaterial, although the deed does not reach the grantee until after the death of the grantor, if it was previously left with a third person for his use.<sup>13</sup> But to constitute delivery good for any purpose, the grantor must divest himself of all power and dominion over the deed.<sup>14</sup> The term "delivery" implies a parting with the possession, and a surrender of authority over the deed by the grantor at that time, either absolutely or conditionally<sup>15</sup>—absolutely, if the effect of the deed is to be immediate, and the title is to pass at once to the grantee; but conditionally, if the operation of the deed is made dependent on the performance of some con-

dition, or the happening of some subsequent event.<sup>16</sup> If the deed is subject to be recalled by the grantor, before delivery to the grantee, it is held to be no delivery on the part of the grantor,<sup>17</sup> although he should die without recalling it.<sup>18</sup>

1 *Jones v. Jones*, 6 Conn. 111, 16 Am. Dec. 35; *Rutledge v. Montgomery*, 30 Ga. 641; *Fisher v. Hall*, 41 N. Y. 421, 422; *Younge v. Gailbeau*, 3 Wall. 641; *Critchfield v. Critchfield*, 24 Pa. St. 100; *Stiles v. Brown*, 16 Vt. 563; *Armstrong v. Stovall*, 26 Miss. 275; *Brown v. Westerfield*, 47 Neb. 399, 53 Am. St. Rep. 532; *Stone v. French*, 37 Kan. 145, 1 Am. St. Rep. 237; *Weber v. Christen*, 121 Ill. 91, 2 Am. St. Rep. 68; *Gore v. Dickinson*, 98 Ala. 363, 39 Am. St. Rep. 67; *McClun v. McClun*, 176 Ill. 376.

2 *Hood v. Brown*, 2 Ohio, 267; *Nay v. Mograin*, 24 Kan. 75; *Harrison v. Phillips Academy*, 12 Mass. 455; *Jackson v. Bard*, 4 Johns. 230, 4 Am. Dec. 267; *Harman v. Oberdorfer*, 33 Gratt. 497; *Egeny v. Woodard*, 56 Me. 45. But see *Smith v. Porter*, 10 Gray, 67; *Elsev v. Metcalf*, 1 Denio, 323.

3 *Jackson v. Bard*, 4 Johns. 230, 4 Am. Dec. 267; and see sec. 291, ante.

4 *Goddard's Case*, 2 Rep. 4b; *Younge v. Gailbeau*, 3 Wall. 641; *Brown v. Brown*, 66 Me. 316; *Colee v. Colee*, 122 Ind. 109, 17 Am. St. Rep. 345; *Taft v. Taft*, 59 Mich. 185, 60 Am. Rep. 291; *Tisher v. Beckwith*, 30 Wis. 55, 11 Am. Rep. 546. But the deed of a corporation need not be delivered, since the corporate seal gives perfection to the instrument without further ceremony: See *Derby Canal v. Wilmot*, 9 East, 360; *Boone on Corporations*, sec. 54. So title by patent from the United States is title by record, and the delivery of the instrument to the patentee is not essential to pass the title: *United States v. Schurz*, 102 U. S. 378, 397.

5 *Hawksland v. Gatchel*, Cro. Eliz. 835; 2 *Washburn on Real Property*, \*577; and see *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592.

6 Ward v. Winslow, 4 Pick. 518; Stewart v. Redditt, 3 Md. 67; Corner v. Baldwin, 16 Minn. 172; Best v. Brown, 25 Hun, 223; O'Connor v. O'Connor, 100 Iowa, 476; Ten Eyck v. Whitbeck, 156 N. Y. 341. Compare Commonwealth v. Jackson, 10 Bush, 424.

7 Chandler v. Temple, 4 Cush. 285; Newlin v. Beard, 6 W. Va. 110; Jones v. Swayze, 42 N. J. L. 279; Southern Life Ins. Co. v. Cole, 4 Fla. 359; and see Little v. Gibson, 39 N. H. 505; Morris v. Henderson, 37 Miss. 501; Roberts v. Swearingen, 8 Neb. 363; Goodwin v. Ward, 6 Baxt. 107; Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151.

8 Thoroughgood's Case, 9 Rep. 136; Verplank v. Sterry, 12 Johns. 536, 7 Am. Dec. 348; Hatch v. Bates, 54 Me. 139; Mills v. Gore, 20 Pick. 36.

9 McClure v. Colclough, 17 Ala. 89; Burkholder v. Casad, 47 Ind. 418; Warren v. Sweet, 31 N. H. 332; Brown v. Brown, 66 Me. 316.

10 Brown v. Brown, 66 Me. 316; Foster v. Mansfield, 3 Met. 412; Marsh v. Austin, 1 Allen, 238; Hathaway v. Payne, 34 N. Y. 92; Duncan v. Pope, 47 Ga. 445; Stone v. Duvall, 77 Ill. 475; Morgan v. Hazlehurst Lodge, 53 Miss. 674; Stephens v. Rinehart, 72 Pa. St. 434; Mather v. Corliss, 103 Mass. 568; Fisher v. Hall, 41 N. Y. 416; Doe v. Knight, 5 Barn. & C. 671.

11 Cincinnati etc. R. R. Co. v. Iliff, 13 Ohio St. 235; Eckman v. Eckman, 55 Pa. St. 269; Hatch v. Bates, 54 Me. 136; Stilwell v. Hubbard, 20 Wend. 44.

12 Turner v. Whidden, 22 Me. 121; Brown v. Brown, 66 Me. 316; Fisher v. Hall, 41 N. Y. 423; Chamberlain v. Woodward, 22 Hun, 440.

13 Thatcher v. St. Andrew's Church, 37 Mich. 264; McLean v. Nelson, 1 Jones, 396; Foster v. Mansfield, 3 Met. 412; Goodell v. Pierce, 2 Hill, 659; Sneathen v. Sneathen, 104 Mo. 201, 24 Am. St. Rep. 326. Compare Fisher v. Hall, 41 N. Y. 416; Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 592.

14 Younge v. Gailbeau, 3 Wall. 641; Parmelee v. Simpson, 5 Wall. 81; Tibbals v. Jacobs, 31 Conn. 428; Oliver v. Stone, 24 Ga. 63; Hoyt v. McLagan, 87 Iowa, 751; Porter v. Woodhouse, 59 Conn. 568, 21 Am. St. Rep. 131; Fain v. Smith, 14 Or. 82, 58 Am. Rep. 281; Schuffert v. Grote, 88 Mich. 650, 26 Am. St. Rep. 316. It is with

great reluctance that the courts will uphold a deed executed by the grantor, but retained in his possession to take effect after his death: See *Jones v. Jones*, 6 Conn. 111, 16 Am. Dec. 35; *Huey v. Huey*, 65 Mo. 689; *Burnett v. Burnett*, 40 Mich. 361; *Stow v. Miller*, 16 Iowa, 460; *Newton v. Bealer*, 41 Iowa, 334; *Davis v. Williams*, 57 Miss. 843; *Mitchell v. Ryan*, 3 Ohio St. 382; *Shurtleff v. Francis*, 118 Mass. 154; *Walker v. Walker*, 42 Ill. 311; *Patterson v. Snell*, 67 Me. 559; *Ruckman v. Ruckman*, 32 N. J. Eq. 259.

15 *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; and see *Bary v. Anderson*, 22 Ind. 39; *Merrills v. Swift*, 18 Conn. 257; *Jones v. Swayze*, 42 N. J. L. 279.

16 *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; and see *Hagood v. Harley*, 8 Rich. 325; *Henrichsen v. Hodgen*, 67 Ill. 179; *Kane v. Machin*, 17 Miss. 387; *Gibson v. Partee*, 2 Dev. & B. 530.

17 *Fitch v. Bunch*, 30 Cal. 213; *Cook v. Brown*, 34 N. H. 460; *Jacobs v. Alexander*, 19 Barb. 243.

18 *Brown v. Brown*, 66 Me. 316; *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592. But compare *Belden v. Carter*, 4 Day, 66, 4 Am. Dec. 185; *Woodward v. Camp*, 22 Conn. 461; *Hathaway v. Payne*, 34 N. Y. 106.

### § 295a. Same—Continued.

Delivery of a deed includes not only an act by which the grantor parts with the possession of it, but also a concurring intent on the part of the grantor that it shall vest the title in the grantee. Act and intention are the two elements or conditions essential to a delivery.<sup>1</sup> But no particular act or form of words is necessary to constitute such a delivery, and anything done by the grantor from which it is apparent that a delivery was intended, either by words or acts, or both combined, is sufficient.<sup>2</sup> It is enough that the minds of the contracting parties meet, expressly or

tacitly, in the intent to give the deed present effect.<sup>3</sup> But merely handing a deed, not dated or acknowledged, to the grantee named therein at his request, to be examined by his lawyer, and the bargain to be completed subsequently, is not such a delivery as will make the deed operative.<sup>4</sup>

A deed may be delivered to a third person for the benefit of the grantee, and, if subsequently assented to by the latter, the delivery is as effective to pass the title as if made directly to him.<sup>5</sup> But in order to pass the title, the facts and circumstances attending the transaction must be such as to show that the grantor intended that the deed should be delivered by the custodian to the grantee.<sup>6</sup> If the deed be delivered to a third person in the absence of the grantee, and the conveyance is positively beneficial to him or her, acceptance will be presumed, and the deed will ordinarily take effect from the time of delivery to such third person.<sup>7</sup> This rule is very generally applied in cases of deeds of gift by parents to their children.<sup>8</sup> When the grantees are infants, the law presumes assent on their part to a beneficial conveyance, and knowledge of the conveyance and delivery is not essential.<sup>9</sup> Where a grantor makes a deed and delivers it to a third person to hold until his death, and then to deliver it to the grantee, and parts with all control over it, and reserves no right to recall the deed, or alter its provisions, the delivery in such case will be ef-



fective, and the grantee on the death of the grantor will succeed to the title.<sup>10</sup> But a deed cannot be made to perform the functions of a will;<sup>11</sup> and if the grantor dies without parting with the control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it.<sup>12</sup> A deed delivered after the death of the grantor cannot affect his creditors, nor constitute any obstacle to the enforcement of their debts in the usual and ordinary course of administration.<sup>13</sup> So, if a deed be delivered to a third person for the use of the grantee, but without his knowledge or assent, his subsequent assent will not defeat the lien of an intervening judgment against the grantor.<sup>14</sup> Acknowledgment of a sheriff's deed without delivery does not vest title in the purchaser.<sup>15</sup>

1 Porter v. Woodhouse, 59 Conn. 568, 21 Am. St. Rep. 131; Wilson v. Wilson, 158 Ill. 567, 49 Am. St. Rep. 176; Trask v. Trask, 90 Iowa, 318, 48 Am. St. Rep. 446, and note; Ten Eyck v. Whitbeck, 156 N. Y. 341; Martin v. Flaharty, 13 Mont. 96, 40 Am. St. Rep. 415; Walter v. Way, 170 Ill. 96; Delaplain v. Grubb, 44 W. Va. 612, 67 Am. St. Rep. 788.

2 Brittain v. Work, 13 Neb. 347; Tyler v. Hall, 106 Mo. 313, 27 Am. St. Rep. 337; Brown v. Westerfield, 47 Neb. 399, 53 Am. St. Rep. 532, and note; Salmer v. Lathrop, 10 S. Dak. 216; Weber v. Christen, 121 Ill. 91, 2 Am. St. Rep. 68; Fain v. Smith, 14 Or. 82, 58 Am. Rep. 281, and note; Byars v. Spencer, 101 Ill. 429, 40 Am. Rep. 212; Rodemeier v. Brown, 169 Ill. 347, 61 Am. St. Rep. 176.

3 Bogie v. Bogie, 35 Wis. 659; Delaplain v. Grubb, 44 W. Va. 612, 67 Am. St. Rep. 788.

4 Curry v. Colburn, 99 Wis. 319, 67 Am. St. Rep. 860.

5 *Brown v. Westerfield*, 47 Neb. 309, 53 Am. St. Rep. 532; *White v. Pollock*, 117 Mo. 467, 38 Am. St. Rep. 671; *Rosseau v. Bleau*, 131 N. Y. 177, 27 Am. St. Rep. 578; and see *Appleman v. Appleman*, 140 Mo. 309, 62 Am. St. Rep. 732.

6 *Trask v. Trask*, 90 Iowa, 318, 48 Am. St. Rep. 446; *Miller v. Meers*, 155 Ill. 284.

7 *Robbins v. Rascoe*, 120 N. C. 79, 58 Am. St. Rep. 774; *Hall v. Hall*, 107 Mo. 101.

8 See *Appleman v. Appleman*, 140 Mo. 309, 62 Am. St. Rep. 732; *Hinson v. Bailey*, 73 Iowa, 544, 5 Am. St. Rep. 700; *Jones v. Kerr*, 59 Kan. 179; *Crabtree v. Crabtree*, 159 Ill. 342; *Miller v. Meer*, 155 Ill. 284; *Parker v. Salmons*, 101 Ga. 160, 65 Am. St. Rep. 291; *Rodemeier v. Brown*, 169 Ill. 347, 61 Am. St. Rep. 176.

9 *Tobin v. Bass*, 85 Mo. 654, 55 Am. Rep. 392; *Hayes v. Boylan*, 141 Ill. 400, 33 Am. St. Rep. 326; *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326; *Weber v. Christen*, 121 Ill. 91, 2 Am. St. Rep. 68.

10 *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326; *Shea v. Murphy*, 164 Ill. 614, 56 Am. St. Rep. 215; *Walter v. Way*, 170 Ill. 96; *Goodposter v. Leathers*, 123 Ind. 121; *Provart v. Harris*, 150 Ill. 40; *White v. Pollock*, 117 Mo. 467, 38 Am. St. Rep. 671; *Bury v. Young*, 98 Cal. 446, 35 Am. St. Rep. 186; *Hinson v. Bailey*, 73 Iowa, 544, 5 Am. St. Rep. 700.

11 *Sneathen v. Sneathen*, 104 Mo. 201, 24 Am. St. Rep. 326; *Seals v. Pierce*, 83 Ga. 787, 20 Am. St. Rep. 344; *Cable v. Cable*, 146 Pa. St. 451.

12 *Id.*; *Provart v. Harris*, 150 Ill. 40; *Wilson v. Wilson*, 158 Ill. 567, 49 Am. St. Rep. 176; *Weisinger v. Cock*, 67 Miss. 511, 19 Am. St. Rep. 320; *Parrott v. Avery*, 159 Mass. 594, 38 Am. St. Rep. 465; *Anderson v. Anderson*, 126 Ind. 62; *Stone v. French*, 37 Kan. 145, 1 Am. St. Rep. 237. See *Phillips v. Lumber Co.*, 94 Ky. 445, 42 Am. St. Rep. 367.

13 *Rosseau v. Bleau*, 131 N. Y. 177, 27 Am. St. Rep. 578.

14 *Hibberd v. Smith*, 67 Cal. 547, 56 Am. Rep. 726.

15 *Hughes v. Miller*, 186 Pa. St. 375.

**§ 295b. Acceptance by Grantee.**

There can be no effectual delivery of a deed without an acceptance by the grantee. There must be both a delivery and acceptance with the intent of making the deed an effective conveyance.<sup>1</sup> But acceptance by a grantee in a deed for his benefit is always implied in the delivery of the deed, and the law presumes that every estate is beneficial to the party to whom it is devised or conveyed, until he renounces it.<sup>2</sup> The rule applies to trust deeds.<sup>3</sup> In cases of voluntary settlements the legal presumption is stronger than in ordinary cases of bargain and sale.<sup>4</sup> The acceptance of a deed poll by the grantee makes it the mutual written contract of the parties.<sup>5</sup>

1 *McIlhargy v. Chambers*, 117 N. Y. 532; *Ten Eyck v. Whitbeck*, 156 N. Y. 341; *O'Connor v. O'Connor*, 100 Iowa, 476.

2 *Bowden v. Parrish*, 86 Va. 67, 19 Am. St. Rep. 873; *Rivard v. Walker*, 39 Ill. 413; *Thompson v. Candor*, 60 Ill. 244; *Haenni v. Bleisch*, 146 Ill. 262; *Appleman v. Appleman*, 140 Mo. 309, 62 Am. St. Rep. 732.

3 *Stone v. King*, 7 R. I. 358, 84 Am. Dec. 557.

4 *Crabtree v. Crabtree*, 159 Ill. 342; *Colee v. Colee*, 122 Ind. 109, 17 Am. St. Rep. 345; *Douglas v. West*, 140 Ill. 455, and other citations in preceding section.

5 *Burbank v. Pillsbury*, 48 N. H. 475, 97 Am. Dec. 633; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189.

**§ 295c. Proof of Delivery—Presumptions.**

The question of delivery of a deed, involving as it does acceptance, is always one of intention, and, where the evidence is conflicting it becomes

a question of fact to be determined by a jury.<sup>1</sup> Possession of a deed by the grantee named therein, or by one claiming under him, is prima facie evidence of its delivery.<sup>2</sup> This presumption is not conclusive, and it is always competent to show that the deed, although in the grantee's hands, has never in fact been delivered, unless the grantor, or those claiming through him, are estopped in some way from asserting the nondelivery of the deed.<sup>3</sup> The delivery of a deed to a recorder for registry is not a delivery to the grantee, and is not effective to transfer title.<sup>4</sup> It is, however, held that the signing, attestation, and acknowledgment of a deed by the grantor and the recording of it raises a presumption of delivery, which cannot be overcome by declarations of the grantor that the deed was not delivered.<sup>5</sup> It is also held that a deed duly recorded is admissible in evidence without further proof, not only to show that it was signed, but that it was also delivered.<sup>6</sup> The presumption that a deed was delivered and accepted at its date,<sup>7</sup> and also the presumption of delivery arising from recording, may be repelled by proof of attendant facts and subsequent circumstances, such as the possession and control of the property by the grantor, the declarations of the supposed grantee which are inconsistent with the transfer of title, which, with the acts and conduct of the parties, are all circumstances to be considered in determining whether there has

been a delivery and acceptance of the deed.<sup>8</sup> But the date of a deed is held to be *prima facie* evidence of its delivery at that date, even though it was not acknowledged until a later day.<sup>9</sup>

1 Ten Eyck v. Whitbeck, 156 N. Y. 341.

2 Ward v. Dougherty, 75 Cal. 240, 7 Am. St. Rep. 151; Tunison v. Chamblin, 88 Ill. 379; McGee v. Allison, 94 Iowa, 527; 63 N. W. Rep. 322.

3 Price v. Hudson, 125 Ill. 284; Curry v. Colburn, 99 Wis. 319, 67 Am. St. Rep. 860; and see Gibbons v. Ellis, 83 Wis. 434; Reichart v. Wilhelm, 83 Iowa, 510.

4 Cravens v. Rossiter, 116 Mo. 338, 38 Am. St. Rep. 606; and so, to same effect, O'Connor v. O'Connor, 100 Iowa, 476; Deere v. Nelson, 73 Iowa, 186.

5 Ingles v. Ingles, 150 Pa. St. 397; Kern v. Howell, 180 Pa. St. 315, 57 Am. St. Rep. 641; and so, to same effect, Burke v. Adams, 80 Mo. 504, 50 Am. Rep. 510; Tobin v. Bass, 85 Mo. 654, 55 Am. Rep. 392; Harvill v. Lowe, 47 Ga. 217.

6 Rushin v. Shields, 11 Ga. 640, 56 Am. Dec. 436; Parker v. Salmons, 101 Ga. 160, 65 Am. St. Rep. 291.

7 See sec. 291, ante.

8 Ten Eyck v. Whitbeck, 156 N. Y. 341; and see Colee v. Colee, 122 Ind. 109, 17 Am. St. Rep. 345; Lake Erie etc. R. R. Co. v. Whitham, 155 Ill. 514, 46 Am. St. Rep. 355.

9 Smith v. Porter, 10 Gray, 66; Conley v. Finn, 171 Mass. 70, 68 Am. St. Rep. 399; Harman v. Oberdorfer, 83 Gratt. 497; People v. Snyder, 41 N. Y. 397.

## § 296. Delivery of, as an Escrow.

When a deed is delivered to a third person, to be held until the performance of some condition or the happening of some event, it is termed a conditional delivery, or delivery in escrow.<sup>1</sup> And a delivery in escrow is, and can only be, made by placing the deed in the hands of a third person,<sup>2</sup>

to be kept by him until the performance of some condition or conditions by the grantee or someone else, or until the happening of some event;<sup>3</sup> and the title only passes on performance of the condition or the happening of the event,<sup>4</sup> except in certain cases where, by fiction of law, the writing is allowed to take effect from the first delivery.<sup>5</sup> Thus, in case the grantor should die before condition performed, and it is afterward performed, the law from necessity will give effect to the first delivery, and make it the deed of the grantor from that time.<sup>6</sup> The condition or contingency upon which a deed is delivered in escrow may be expressed in writing, or rest in parol, or be partly in writing and in part parol.<sup>7</sup> There can be no escrow until there is an actual contract of sale on the one side, and of purchase on the other. Thus, if the title remains to be settled to the satisfaction of the contracting parties, a deed cannot be regarded as an escrow.<sup>8</sup> Where a deed is executed in consideration of a prior indebtedness, and is left in escrow to be delivered to the creditor if such debt be not liquidated within an agreed time, and the debt is not paid, the grantor cannot make a second deed passing title to one who has notice of the escrow.<sup>9</sup> If an escrow has been improperly delivered or obtained from the depositary by fraud, the grantor may ratify the delivery. Express ratification is not required, but, in its absence, injury caused by the grantor's

silence, inaction, or acquiescence must be shown before a ratification of wrongful delivery can be presumed against him from the facts.<sup>10</sup> The question of ratification in such case is one of fact for the jury, if the evidence is indefinite and inferences are to be drawn.<sup>11</sup>

1 Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 594; Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep. 369; Cannon v. Handley, 72 Cal. 133; Marshall v. Blass, 82 Mich. 518; and see Sheppard's Touchstone, 58; Johnson v. Baker, 4 Barn. & Ald. 440; Jackson v. Catlin, 2 Johns. 248, 3 Am. Dec. 415; State Bank v. Evans, 15 N. J. L. 155, 28 Am. Dec. 400; Stone v. Duvall, 77 Ill. 475; Brown v. Stutson, 100 Mich. 574, 43 Am. St. Rep. 462.

2 Dawson v. Hall, 2 Mich. 390; Miller v. Fletcher, 27 Gratt. 403, 21 Am. Rep. 356; Johnson v. Branch, 11 Humph. 521; Ordinary etc. v. Thatcher, 41 N. J. L. 403, 32 Am. Rep. 225; Brown v. Reynolds, 5 Sneed, 639; Harkreader v. Clayton, 56 Miss. 383, 31 Am. Rep. 369; Hagood v. Harley, 8 Rich. 325; Dixon v. Savings Bank, 102 Ga. 461, 66 Am. St. Rep. 193; Weber v. Christen, 121 Ill. 91, 2 Am. St. Rep. 68. But the apparent intent of the parties is, in some cases, sustained against a strict construction of the technical rule, that delivery to the agent of the grantee cannot be in escrow: See Watkins v. Nash, L. R. 20 Eq. Cas. 202; 13 Eng. Rep. 781; Ford v. James, 2 Abb. Ct. App. 159; Dietz v. Parish, 12 Jones & S. 190; Gilbert v. Fire Ins. Co., 23 Wend. 43, 35 Am. Dec. 543.

3 Prutsman v. Baker, 30 Wis. 644, 11 Am. Rep. 594. Compare Stenhens v. Rinehart, 72 Pa. St. 434; Wallace v. Harris, 32 Mich. 380. Many of the authorities distinguish between cases where the future delivery is to depend upon the payment of money, or the performance of some other condition, and cases where it is to depend on the happening of some contingency, holding that the former is an escrow, but that the latter will be deemed the grantor's deed presently: See Wheelwright v. Wheelwright, 2 Mass. 454, 3 Am. Dec. 66; Hathaway v. Payne, 34 N. Y. 92. But the distinction will not apply in all

cases, since it would frequently happen to defeat the manifest intention of the parties which it is everywhere conceded should govern: See *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Stone v. Duvall*, 77 Ill. 475.

4 *Duncan v. Pope*, 47 Ga. 445; *Hinman v. Booth*, 21 Wend. 267; *Jackson v. Rowland*, 6 Wend. 666, 22 Am. Dec. 557; *Dyson v. Bradshaw*, 23 Cal. 528; *Tyler v. Cate*, 29 Or. 524; *Stanley v. Valentine*, 79 Ill. 548; *Ashford v. Prewitt*, 102 Ala. 264, 48 Am. St. Rep. 37. The moment the condition has been performed or the event has happened, the grantee is entitled to the possession of the deed, and thenceforth the depository is regarded as the mere agent or trustee for the grantee: *Prutsman v. Baker*, 30 Wis. 644, 11 Am. Rep. 592; *Couch v. Meeker*, 2 Conn. 302, 7 Am. Rep. 274. But no title vests in a grantee who obtains possession of an escrow without performance of the condition: *Doe v. Knight*, 5 Barn. & C. 671; *Everts v. Agnes*, 4 Wis. 356; 6 Wis. 457. And a bona fide purchaser from him, after the death of the grantor, acquires no title: *Harkreader v. Clayton*, 56 Miss. 383, 31 Am. Rep. 369; and see *Chipman v. Tucker*, 38 Wis. 43, 20 Am. Rep. 1; *Jackson v. Lynn*, 94 Iowa, 151, 58 Am. St. Rep. 386; *Dixon v. Savings Bank*, 102 Ga. 461, 66 Am. St. Rep. 193. But see *Blight v. Schenck*, 10 Pa. St. 285, 51 Am. Dec. 478; *Souverbye v. Arden*, 1 Johns. Ch. 240; *Quick v. Milligan*, 108 Ind. 419, 58 Am. Rep. 49.

5 See *Jackson v. Rowland*, 6 Wend. 666, 22 Am. Dec. 557; *Shirley v. Ayres*, 14 Ohio, 307.

6 *Perryman's Case*, 3 Coke, 84; *Hatch v. Hatch*, 9 Mass. 310, 6 Am. Dec. 67.

7 *Stanton v. Miller*, 58 N. Y. 192. See, also, *Jackson v. Sheldon*, 22 Me. 569; *Millet v. Parker*, 2 Met. (Ky.) 616; *Nichols v. Nichols*, 28 Vt. 228, 67 Am. Dec. 699; *Murray v. Stair*, 2 Barn. & C. 82.

8 *Miller v. Sears*, 91 Cal. 282, 25 Am. St. Rep. 176.

9 *Conneau v. Geis*, 73 Cal. 176, 2 Am. St. Rep. 785.

10 *Dixon v. Savings Bank*, 102 Ga. 461, 66 Am. St. Rep. 193.

11 *Dixon v. Savings Bank*, 102 Ga. 461, 66 Am. St. Rep. 193; and see *Burr v. Howard*, 58 Ga. 564.



**§ 297. Attestation.**

Every deed should be duly attested by witnesses, thus affording an easy and effectual mode of establishing its authenticity.<sup>1</sup> But attestation is not of the essence of a deed, at common law,<sup>2</sup> and when not required by the terms of the constitution of a power, or by statute, a deed is valid without attesting witnesses.<sup>3</sup> In many of the states one or more witnesses are required by statute, in order to give validity to a deed;<sup>4</sup> and if a statute requires all deeds to be executed in the presence of two witnesses, a deed executed in the presence of one only is void.<sup>5</sup> It is not necessary that the witness should have actually seen the party execute the deed;<sup>6</sup> if the latter signs his name alone, and then calls witnesses, before whom he acknowledges the instrument, it is sufficient.<sup>7</sup> A witness, though blind, should be produced to prove the execution of the deed, since he may still be able to give important evidence respecting the transaction.<sup>8</sup>

1 See *Dole v. Thurlow*, 12 Met. 166.

2 *Garrett v. Lister*, 1 Lev. 25; *Craig v. Pinson*, Cheves, 272; *Long v. Ramsay*, 1 Serg. & R. 72; *Menley v. Zeigler*, 23 Tex. 88; *Dole v. Thurlow*, 12 Met. 166.

3 *Dole v. Thurlow*, 12 Met. 166. Where there are no subscribing witnesses to a deed, the execution may be proved by proving the handwriting of the party: *Swire v. Bell*, 5 Term Rep. 371.

4 See 2 N. Y. Rev. Stats., p. 22; *Kentucky Bank v. Jones*, 59 Ala. 123; *Winsted Sav. Bank v. Spencer*, 26 Conn. 195; *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430; *Shirley v. Fearne*, 33 Miss. 653, 69 Am. Dec. 375;

Richardson v. Bates, 8 Ohio St. 261; Genter v. Morrison, 31 Barb. 155; 4 Kent's Commentaries, 457.

5 Clark v. Graham, 6 Wheat. 577; Stone v. Ashley, 13 N. H. 38; and see Merwin v. Camp, 3 Conn. 35; sec. 277, ante.

6 Parke v. Mears, 2 Bos. & P. 217.

7 Parke v. Mears, 2 Bos. & P. 217; Jackson v. Phillips, 9 Cow. 113.

8 Rees v. Williams, 1 De Gex & S. 314; Cronk v. Frith, 9 Car. & P. 197; 2 Moody & R. 262; 2 Greenleaf's Cruise on Real Property, 342, note. But see Pedler v. Paige, 1 Moody & R. 258.

### § 298. Requisite Reading of.

If a party to the execution of a deed is unable to read it, and he requires it to be read to him, and it is not done, or is read falsely, this is sufficient to avoid the deed.<sup>1</sup> But a grantor is presumed to know the contents of the deed which he signs,<sup>2</sup> and also the date.<sup>3</sup> And he will not be permitted to avoid it on the ground that he was ignorant of its legal effect.<sup>4</sup> And if it be agreed by collusion between parties that the deed should be read falsely, on purpose to avoid it, it will nevertheless bind the fraudulent party.<sup>5</sup>

1 Hallenbeck v. Dewitt, 2 Johns. 404; Jackson v. Hayner, 12 Johns. 473.

2 Kimball v. Eaton, 8 N. H. 391

3 See Androscoggin Bank v. Kimball, 10 Cush. 373.

4 Manser's Case, 2 Rep. 3.

5 2 Greenleaf's Cruise on Real Property, 328; Rex v. Longnor, 1 Nev. & M. 576.

**§ 299. Formal Parts of.**

The several parts of a deed are formally distinguished by early writers as: The premises, the habendum, the tenendum, the reddendum, condition, warranty, and covenant.<sup>1</sup> The premises embrace that part of the deed preceding the habendum, including date,<sup>2</sup> names of parties,<sup>3</sup> consideration,<sup>4</sup> recitals,<sup>5</sup> description of property,<sup>6</sup> and the exceptions, if any.<sup>7</sup> The habendum declares what estate or interest is granted, though this may be also done in the premises, and it is not, therefore, regarded as an essential part of a deed.<sup>8</sup> But if no particular estate is mentioned in the premises, the habendum then becomes efficient to declare the intention.<sup>9</sup> The tenendum was formerly used to express the tenure by which the estate granted was to be held, and is now joined to the habendum.<sup>10</sup> The reddendum clause is that whereby the grantor reserves some new thing to himself out of what he had before granted, such as rent.<sup>11</sup> The condition is a clause of contingency, upon the happening of which the estate granted may be defeated.<sup>12</sup> Then follow the warranty and covenants;<sup>13</sup> and the whole deed concludes with a brief form of words connecting its contents with the signatures and seals of the parties, and those with the date.<sup>14</sup> It is not necessary in order to pass a title that a deed should be written in the order above stated;<sup>15</sup> and the parts of a deed which are really

essential may be expressed in few words.<sup>16</sup> Brief forms of deeds have been prescribed by statute in some of the states,<sup>17</sup> and generally in the United States the form of a conveyance is very simple.<sup>18</sup> Any words indicating an intention to transfer the estate, interest, or claim of the grantor are sufficient to constitute a deed.<sup>19</sup>

1 Coke on Littleton, 6a, 7a; Sheppard's Touchstone, 74; 2 Greenleaf's Cruise on Real Property, 327, 328; 2 Washburn on Real Property, 611. See *Evenson v. Webster*, 3 S. Dak. 382, 44 Am. St. Rep. 802.

2 Sec. 291, ante.

3 Sec. 290, ante.

4 Sec. 292, ante.

5 Sec. 300, post.

6 Sec. 301, post.

7 Sec. 303, post. The premises determine the subject matter of the deed: See *Thompson v. Thompson*, 9 Ind. 323; *Sumner v. Williams*, 8 Mass. 174; *Evenson v. Webster*, 3 S. Dak. 382, 44 Am. St. Rep. 802.

8 See 4 Kent's Commentaries, 468; *Stockton v. Martin*, 2 Bay, 471; *Kenney v. Wallace*, 24 Hun, 478; *Nightingale v. Hidden*, 7 R. I. 118; *Tyler v. Moore*, 42 Pa. St. 387; *Farquharson v. Eichelberger*, 15 Md. 63; *Kenworthy v. Tullis*, 3 Ind. 96; *Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365.

9 *Berry v. Billings*, 44 Me. 416, 69 Am. Dec. 107. Compare *Jamaica Pond v. Chandler*, 9 Allen, 168.

10 2 Greenleaf's Cruise on Real Property, 327; Sheppard's Touchstone, 52.

11 Coke on Littleton, 47a; and see *Case v. Haight*, 3 Wend. 635; *State v. Wilson*, 42 Me. 9; *Doe v. Lock*, 4 Nev. & M. 807.

12 See sec. 202 et seq.; *Laberee v. Carleton*, 53 Me. 213.

13 Sec. 316 et seq., post. See *Sisson v. Seabury*, 1 Sum. 262.

14 2 Greenleaf's Cruise on Real Property, 328; Burton on Real Property, sec. 514.

15 See Burton on Real Property, sec. 514.

16 Coke on Littleton, 7a; Sheppard's Touchstone, 75; 4 Kent's Commentaries, 461.

17 See Funk v. Creswell, 5 Iowa, 68; Miller v. Miller, Meigs, 484; Matthews v. Ward, 10 Gill & J. 419; Cal. Civ. Code, sec. 1092.

18 See 4 Kent's Commentaries, 461.

19 Evenson v. Webster, 3 S. Dak. 382, 44 Am. St. Rep. 802; Watters v. Bredin, 70 Pa. St. 235; Harlowe v. Hudgins, 84 Tex. 107, 31 Am. St. Rep. 21; Field v. Columbet, 4 Saw. 523; Cross v. Weare Commission Co., 153 Ill. 499, 46 Am. St. Rep. 902.

### § 300. Recitals and Their Effect.

The recitals in a deed constitute a narrative of such facts, assurances, and agreements as are necessary to explain the reasons upon which the present transaction is founded.<sup>1</sup> Though not an essential part of a deed, it is usually inserted, and often affords a valuable clew to the intention of the parties.<sup>2</sup> But recitals will not be permitted to control the operative part of the deed, if the plain intent would be thereby defeated.<sup>3</sup> All the parties to a deed, their privies in blood, in estate, and in law, are bound by recitals which legitimately appertain to the subject matter thereof;<sup>4</sup> but strangers are not generally bound by the recitals in a deed.<sup>5</sup> Nor will a party be prejudiced by recitals in a deed which was executed under judicial compulsion.<sup>6</sup> A misrecital will not invalidate a deed,<sup>7</sup> and especially if it be immaterial and irrelevant.<sup>8</sup> And where a fact is recited,

as a marriage, which proves to be false, though the intention of the parties may have been founded on the mistake, the conveyance is good.<sup>9</sup> Mistakes of facts in recitals of deeds given by officers who sell under judicial authority may be explained.<sup>10</sup> A party to a deed is not bound by recitals in other deeds, through which he derived title.<sup>11</sup>

1 See 2 Greenleaf's Cruise on Real Property, 624; *Allen v. Holton*, 20 Pick. 463; *Farrell v. Hilditch*, 5 Com. B., N. S., 840. It usually commences with the formal word "whereas," which, if there are several recitals in connection, is repeated, "and whereas": See 1 Broom & Hadley's Commentaries, Wait's ed., 727.

2 *Moore v. Magrath*, Cowp. 9; *Allen v. Holton*, 20 Pick. 464; *Cholmondeley v. Clinton*, 2 Barn. & Ald. 625; *Powell v. Powell*, 5 Dana, 170.

3 *Schermerhorn v. Negus*, 2 Hill, 335; *Cole v. Patterson*, 25 Wend. 456; *Bottrell v. Summers*, 2 Younge & J. 407.

4 *Robbins v. McMillan*, 26 Miss. 434; *Scott v. Douglass*, 7 Ohio, 227; *Carver v. Jackson*, 4 Pet. 83; *Kaine v. Denniston*, 22 Pa. St. 202; *Rankin v. Warner*, 2 Lea, 302; *Jackson v. Parkhurst*, 9 Wend. 209; *McBurney v. Cutler*, 18 Barb. 203; *Hamilton v. Nutt*, 34 Conn. 501; *Mathews v. Jones*, 47 Neb. 616; *Hubbard v. Knight*, 52 Neb. 400; *Robertson v. Guerin*, 50 Tex. 317; and see sec. 246, ante.

5 *Whitaker v. Garnett*, 3 Bush, 402.

6 *McDougald v. Doherty*, 11 Ga. 570.

7 *Lewen v. Mody*, Cro. Jac. 127; 3 Leon. 135; 2 Greenleaf's Cruise on Real Property, 624.

8 *Lewen v. Mody*, Cro. Jac. 127; 3 Leon. 135.

9 *Boughton v. Sanilands*, 2 Taunt. 342; *Burton on Real Property*, sec. 338.

10 *Glover v. Ruffin*, 6 Ohio, 255. Compare *Brown v. Goodwin*, 1 Abb. N. C. 452. A recital in a deed that the consideration has been paid is only prima facie evidence

of payment: *Parker v. Foy*, 43 Miss. 260, 5 Am. Rep. 484; *Byers v. Locke*, 93 Cal. 493, 27 Am. St. Rep. 212; and see sec. 292, ante.

11 *Carpenter v. Buller*, 8 Mees. & W. 209; *Doe v. Shelton*, 3 Ad. & E. 265; *Wilkins v. Dingley*, 29 Me. 73; *Griggs v. Smith*, 12 N. J. L. 22.

### § 301. Description of Property.

The description of the property or thing granted is of great importance, since its object is to define what the parties intend, the one to convey and the other to receive, by such deed.<sup>1</sup> It is therefore said that the description cannot be too minute and accurate;<sup>2</sup> for, if the subject of the grant cannot be ascertained from the description given, the grant itself becomes void.<sup>3</sup> But the intention of the parties to a deed, as collected from the instrument itself, will guide the court in determining what land is conveyed;<sup>4</sup> and uncertainty in the description will not avoid the deed, if that result can be averted by construction.<sup>5</sup> If there be but one description in the deed, that is to be strictly adhered to.<sup>6</sup> If there be more than one, and they are in conflict, that is to be adopted which is most certain and stable, if it sufficiently identifies the land.<sup>7</sup> If the premises are first described generally, and afterward particularly, and the two descriptions conflict, the latter will in general control.<sup>8</sup> But if the particular description is in any degree uncertain or obscure, and the general description is clear, definite, and certain, the particular de-

scription will not control it.<sup>9</sup> Of two conflicting descriptions equally stable and certain, that is to be preferred which is the more favorable to the grantee.<sup>10</sup> A description by words is preferred to a description by figures.<sup>11</sup> No part of a description is to be rejected if all the parts can stand consistently together.<sup>12</sup> But where, by rejecting a part that is false and impossible, a perfect description still remains, the false part should be rejected, and the deed upheld.<sup>13</sup> An evident omission in the description may be supplied by construction.<sup>14</sup>

1 See *Burton on Real Property*, sec. 544; *Barlow v. Rhodes*, 1 *Crompt. & M.* 439; *Raymond v. Longworth*, 4 *McLean*, 481; *Massie v. Long*, 2 *Ohio*, 287.

2 2 *Greenleaf's Cruise on Real Property*, 628.

3 *United States v. King*, 3 *How.* 773; *Bailey v. White*, 41 *N. H.* 337; *Wofford v. McKinna*, 23 *Tex.* 44; *Campbell v. Johnson*, 44 *Mo.* 247; *Dingey v. Paxton*, 60 *Miss.* 1038; *Tierney v. Brown*, 65 *Miss.* 563, 7 *Am. St. Rep.* 679.

4 *Mulford v. La Frame*, 26 *Cal.* 88; *Bass v. Mitchell*, 22 *Tex.* 285; *Stevens v. Mayor etc.*, 14 *Jones & S.* 274; *Bosworth v. Sturtevant*, 2 *Cush.* 392; *Wendell v. Jackson*, 8 *Wend.* 183, 22 *Am. Dec.* 635; *Newson v. Pryor*, 7 *Wheat.* 7; *Hart v. Hawkins*, 3 *Bibb*, 502, 6 *Am. Dec.* 666.

5 *Andrews v. Murphy*, 12 *Ga.* 431; *Harvey v. Mitchell*, 31 *N. H.* 575; *Kruse v. Wilson*, 79 *Ill.* 233; *Stone v. Stone*, 116 *Mass.* 279.

6 *Den v. Graham*, 1 *Dev. & B.* 76, 27 *Am. Dec.* 226.

7 *Johnson v. McMillan*, 1 *Strob.* 143; *Gates v. Lewis*, 7 *Vt.* 511; *Abbott v. Abbott*, 53 *Me.* 356; *Piercy v. Crandall*, 34 *Cal.* 334; *Robertson v. Mosson*, 26 *Tex.* 248; *Den v. Graham*, 1 *Dev. & B.* 76, 27 *Am. Dec.* 226; *Wade v. Deray*, 50 *Cal.* 376; *Board of Commrs. v. Wiley*, 10 *Or.* 89; *Arambula v. Sullivan*, 80 *Tex.* 621; *Masterson v. Munro*, 105 *Cal.* 431, 45 *Am. St. Rep.* 57; *Lake Erie*



etc. *R. R. Co. v. Whitham*, 155 Ill. 514, 46 Am. St. Rep. 355.

8 2 *Greenleaf's Cruise on Real Property*, 647; *Jones v. Smith*, 73 N. Y. 205; *Gano v. Aldridge*, 27 Ind. 294; *McEowen v. Lewis*, 26 N. J. L. 451; *Prentice v. Railroad Co.*, 154 U. S. 163.

9 *Ela v. Card*, 2 N. H. 175; 9 Am. Dec. 46; *Haley v. Amestoy*, 44 Cal. 132; *Sawyer v. Kendall*, 10 Cush. 241; *Barney v. Miller*, 18 Iowa, 460.

10 *Vance v. Fore*, 24 Cal. 435.

11 *Bradshaw v. Bradbury*, 64 Mo. 334; *Montgomery v. Johnson*, 31 Ark. 74; *Lyman v. Gedney*, 114 Ill. 388, 55 Am. Rep. 871.

12 *Herrick v. Hopkins*, 23 Me. 217; *Lake Erie etc. R. R. Co. v. Whitham*, 155 Ill. 514, 46 Am. St. Rep. 255. Compare *Lane v. Thompson*, 43 N. H. 320.

13 *Tubbs v. Gatewood*, 26 Ark. 128; *Beal v. Gordon*, 55 Me. 482; *Anderson v. Boughman*, 7 Mich. 69; *Wade v. Deray*, 50 Cal. 376; *Bond v. Fay*, 12 Allen, 86; *Raymond v. Coffey*, 5 Or. 132; *Shewalter v. Pirner*, 55 Mo. 218; *Thayer v. Torrey*, 37 N. J. L. 339; *Wendell v. Jackson*, 8 Wend. 183, 22 Am. Dec. 635; *Sherwood v. Whiting*, 54 Conn. 330, 1 Am. St. Rep. 116.

14 *Hoffman v. Riehl*, 27 Mo. 554.

### § 301a. Same—Continued.

The main object of a description of the land in a deed of conveyance is to furnish the means of identification, and, when this is done, it is sufficient.<sup>1</sup> Extraneous testimony, to apply the deed to the subject matter to which it relates, and thus identify it, is admissible to help out the description.<sup>2</sup> If land intended to be conveyed is not identified in the conveyance, it may be subsequently identified by the parties, and if the grantee then takes possession, this ascertains the grant and gives effect to the deed.<sup>3</sup> A general

description in a deed of all the lands of the grantor, of every description belonging to him, wherever situated, has been sustained as sufficient.<sup>4</sup> In case of a general description followed by a clause summing up the intention of the parties as to the premises conveyed, such clause has a controlling effect upon all prior phrases used in the description.<sup>5</sup> A conveyance of a specified number of acres, undivided, in a tract of land described, is not void for uncertainty, but is an effectual conveyance of such a proportion of the tract as the whole number of acres conveyed bears to the whole number of acres in the tract.<sup>6</sup> A deed describing the property sold as fronting on a river conveys the batture or alluvion rights without any provision to that effect in the deed.<sup>7</sup> When the place of beginning in a deed is clearly designated, parol evidence as to the understanding of the parties concerning the same is inadmissible.<sup>8</sup>

1 *Thorn v. Phares*, 35 W. Va. 771.

2 *Foley v. Ruley*, 43 W. Va. 513; *Hutsell v. Crewse*, 138 Mo. 1, 5; *Herrick v. Morrill*, 37 Minn. 250, 5 Am. St. Rep. 841.

3 *Simpson v. Blaisdell*, 85 Me. 199, 35 Am. St. Rep. 348.

4 See *Pettigrew v. Dobbelaar*, 63 Cal. 396; *McCulloh v. Price*, 14 Mont. 320, 43 Am. St. Rep. 637; *Harvey v. Edens*, 69 Tex. 420; *Smith v. Westall*, 76 Tex. 509.

5 *Plummer v. Gould*, 92 Mich. 1, 31 Am. St. Rep. 567; and so to same effect, *Jones v. Pashby*, 62 Mich. 621; *Probett v. Jenkinson*, 105 Mich. 475; *Bent v. Rogers*, 137 Mass. 192; *Witt v. Railway Co.*, 38 Minn. 127.

6 *Gratz v. Improvement Co.*, 82 Fed. Rep. 381; 27 C. C. A. 305; and see, also, *Cullen v. Sprig*, 83 Cal. 56; *Emeric v. Alvarado*, 90 Cal. 444; *Battel v. Smith*, 14 Gray, 497; *Small v. Jenkins*, 16 Gray, 155; *Sheafe v. Wait*, 30 Vt. 735. Sufficiency of description in conveyance of standing timber: See *Mee v. Benedict*, 98 Mich. 260, 39 Am. St. Rep. 543.

7 *Meyers v. Mathis*, 42 La. Ann. 471. See *Gratz v. Improvement Co.*, 82 Fed. Rep. 381; 27 C. C. A. 305; *Palmer v. Farrell*, 129 Pa. St. 162, 15 Am. St. Rep. 708; *Chandos v. Mack*, 77 Wis. 573, 20 Am. St. Rep. 139; sec. 302a, post.

8 *Neal v. Hopkins*, 87 Md. 19.

### § 302. Boundaries, etc.

Boundary is "any separation, natural or artificial, which marks the confines or line of two contiguous estates."<sup>1</sup> Natural boundaries are natural objects remaining where they were placed by nature; as shores,<sup>2</sup> rivers, brooks, and creeks,<sup>3</sup> ponds,<sup>4</sup> beaches,<sup>5</sup> streets or highways,<sup>6</sup> and the like.<sup>7</sup> So a farm may be a monument to determine boundary;<sup>8</sup> so of a lot of a designated number in a city.<sup>9</sup> Artificial boundaries are those erected by man;<sup>10</sup> and if certain monuments are referred to in a description, which do not exist at the time, the parties may afterward, in good faith and by mutual agreement, erect monuments as and for those intended in the description.<sup>11</sup> And this placing of monuments, and the consent and agreement of the parties in relation thereto, may be shown by parol.<sup>12</sup> As a general rule, natural objects, being of a more permanent and notorious character than artificial ones, are on

that account to be preferred as monuments in forming boundary lines, where the two kinds conflict.<sup>13</sup> But where artificial monuments in any given case are obviously the more certain, they will be preferred.<sup>14</sup> And a description by known and visible monuments, either natural or artificial, are generally preferred to a description by courses and distances and other measurements.<sup>15</sup> But this rule is not inflexible, and is never adhered to when it would lead to an absurdity;<sup>16</sup> and, when there is anything in the description which shows that the courses and distances are right in themselves, they will prevail over monuments.<sup>17</sup> Monuments control only so far as is necessary to give effect to the apparent intent of the parties.<sup>18</sup> If there are no monuments, the land must be bounded by the courses and distances named in the patent or deed.<sup>19</sup> Generally speaking, distances yield to courses,<sup>20</sup> and quantity yields to all the descriptive particulars in a deed,<sup>21</sup> unless the intent to give only a certain quantity is very clear.<sup>22</sup> A plan or survey referred to in a deed controls courses and distances,<sup>23</sup> and even monuments, where it best comports with the intent of the parties.<sup>24</sup> And, as a general rule, if there is obviously a mistake in the description, an inferior means of location may control a higher.<sup>25</sup> Monuments which control courses and distances stated in a deed are confined to those to which the conveyance itself refers.<sup>26</sup>

1 1 Bouvier's Law Dictionary, 218.

2 Hathaway v. Wilson, 123 Mass. 361; Teschemacher v. Thompson, 18 Cal. 21; Littlefield v. Maxwell, 31 Me. 134, 50 Am. Dec. 653; Martin v. O'Brien, 34 Miss. 21; McCullough v. Wainright, 14 Pa. St. 171; Yates v. Van De Bogert, 56 N. Y. 531; Freeman v. Bellagarde, 108 Cal. 179, 49 Am. St. Rep. 76; Oakes v. De Lancey, 133 N. Y. 227, 28 Am. St. Rep. 628.

3 Arnold v. Elmore, 16 Wis. 509; Child v. Starr, 4 Hill, 369; Hicks v. Coleman, 25 Cal. 142; Wheeler v. Spinola, 54 N. Y. 385; Primm v. Walker, 38 Mo. 94; Stanford v. Mangin, 30 Ga. 355.

4 Mill River etc. Co. v. Smith, 34 Conn. 462; Nosstrand v. Durland, 21 Barb. 478; Wood v. Kelley, 30 Me. 47; Waterman v. Johnson, 13 Pick. 261; State v. Gilman-ton, 9 N. H. 461.

5 Hodge v. Boothby, 48 Me. 71; Dana v. Jackson Street Wharf, 31 Cal. 120, 89 Am. Dec. 164; East Hampton v. Kirk, 6 Hun, 257; 84 N. Y. 215, 38 Am. Rep. 505.

6 Falls v. Reis, 74 Pa. St. 439; Gove v. White, 20 Wis. 432; Tibbetts v. Estes, 52 Me. 566; Dunham v. Williams, 37 N. Y. 251; Stevens v. Mayor etc., 14 Jones & S. 274; Chatham v. Brainard, 11 Conn. 60; Faris v. Phelan, 39 Cal. 612; Smith v. Howden, 14 Com. B., N. S., 398. Where land is sold bordering on a highway, the grantee takes the fee to the middle line thereof: Gear v. Barnum, 37 Conn. 229; Oxton v. Groves, 68 Me. 371, 28 Am. Rep. 75; Low v. Tibbetts, 72 Me. 92, 39 Am. Rep. 303; Stark v. Coffin, 105 Mass. 328; Salter v. Jonas, 39 N. J. L. 469, 23 Am. Rep. 229. Compare Hoboken Land Co. v. Kerrigan, 30 N. J. L. 16; Palmer v. Dougherty, 33 Me. 507. But if the roadbed belongs to the government and not to the abutters, the deed carries title only to the roadside: White v. Godfrey, 97 Mass. 472; Dunham v. Williams, 37 N. Y. 251; Falls v. Reis, 74 Pa. St. 439; and see Kings County Fire Ins. Co. v. Stevens, 87 N. Y. 287, 41 Am. Rep. 361.

7 See Stapleford v. Brinson, 2 Ired. 311; Hoffman v. Armstrong, 48 N. Y. 201; Patton v. Alexander, 7 Jones, 603.

8 Cate v. Thayer, 3 Me. 71; and see Northrop v. Sumney, 27 Barb. 196; Flagg v. Thurston, 13 Pick. 145.

9 Sayers v. Lyons, 10 Iowa, 249; Rutherford v. Tracy, 48 Mo. 325; and see Powers v. Jackson, 50 Cal. 429.

10 See Call v. Barker, 12 Me. 320; Fleischfresser v. Schmidt, 41 Wis. 223; White v. Williams, 48 N. Y. 344.

11 Waterman v. Johnson, 13 Pick. 267; Emery v. Fowler, 38 Me. 99; Lerner v. Morrill, 2 N. H. 197; Makepeace v. Bancroft, 12 Mass. 469.

12 Waterman v. Johnson, 13 Pick. 267; and see Kellenn v. Smith, 65 Pa. St. 86; Kincaid v. Dormey, 47 Mo. 337.

13 Cox v. Freedley, 33 Pa. St. 124; Fulwood v. Graham, 1 Rich. 491; Bolton v. Laun, 16 Tex. 96; Higinbotham v. Stoddard, 72 N. Y. 94.

14 Lincoln v. Wilder, 29 Me. 169.

15 Fulwood v. Graham, 1 Rich. 491; Galvin v. Collins, 128 Mass. 525; Kalbfleisch v. Standard Oil Co., 43 N. J. L. 259; Woodward v. Nims, 130 Mass. 70; West v. Shaw, 67 N. C. 489; Dickson v. Wilson, 82 N. C. 487; Keenan v. Cavanaugh, 44 Vt. 268; Yates v. Van De Bogert, 56 N. Y. 526; Welder v. Hunt, 34 Tex. 44; Johnson v. Preston, 9 Neb. 474; Curtis v. Aaronson, 49 N. J. L. 68, 60 Am. Rep. 584.

16 Davis v. Rainsford, 17 Mass. 207.

17 Higinbotham v. Stoddard, 72 N. Y. 94; and see Mizell v. Simmons, 79 N. C. 182; Jones v. Burgett, 46 Tex. 284; Den v. Graham, 1 Dev. & B. Eq. 76, 27 Am. Dec. 226.

18 Johnson v. McMillan, 1 Strob. 143; Hamilton v. Foster, 45 Me. 32; White v. Luning, 93 U. S. 515.

19 Chinoweth v. Haskell, 3 Pet. 96; Grand Trunk Ry. Co. v. Dyer, 49 Vt. 74; Drew v. Swift, 46 N. Y. 204; Sanders v. Godding, 45 Iowa, 463; Opdyke v. Stevens, 28 N. J. L. 83.

20 Bryan v. Beckley, Litt. Sel. Cas. 91, 12 Am. Dec. 276; Hoffman v. Riehl, 27 Mo. 554.

21 Wendell v. Jackson, 8 Wend. 183, 22 Am. Dec. 635; Clark v. Scammon, 62 Me. 47; Fuller v. Carr, 33 N. J. L. 157; Peay v. Briggs, 2 Mill (Const.), 98, 12 Am. Dec. 656; Winans v. Cheney, 55 Cal. 267.

22 Kirkland v. Way, 3 Rich. 4; Pierce v. Faunce, 37 Me. 63.

23 See *Heaton v. Hodges*, 14 Me. 66, 30 Am. Dec. 731, 741, note; *Birmingham v. Anderson*, 48 Pa. St. 253; *Powers v. Jackson*, 50 Cal. 429; *Kennebec Purchase v. Tiffany*, 1 Me. 219, 10 Am. Dec. 60; *Wolfe v. Scarborough*, 2 Ohio St. 361.

24 *Erskine v. Moulton*, 66 Me. 276.

25 *Newhall v. Ireson*, 8 Cush. 595, 54 Am. Dec. 790; *Haynes v. Young*, 36 Me. 557; *Jones v. Burgett*, 46 Tex. 484.

26 *Kashman v. Parsons*, 70 Conn. 295.

### § 302a. Waters as Boundaries.

A general grant of land on a river or stream, non-navigable, extends the line of the grantee to the center or thread of the current.<sup>1</sup> And this rule has been held applicable to grants of land upon navigable streams above tide-water, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the stream.<sup>2</sup> In Wisconsin, the owner of the bank of a navigable stream, by purchase from the United States, is conclusively presumed to be the owner of the bed of the stream in front of his purchase to the middle or thread thereof. The same presumption likewise arises in favor of the owner of such bank in all cases, however such owner acquires his title, but the presumption in case of owners not deriving their title directly from the government is not conclusive.<sup>3</sup> The rule asserted in some jurisdictions is, that when lands are described in a deed as bounded by a navigable river where the tide ebbs and flows, the title ends at high-water mark.<sup>4</sup> In Pennsylvania, the grant

in such case extends to ordinary low-water mark.<sup>5</sup> And the authorities are numerous to the effect that when a deed bounds the premises therein conveyed by a natural lake or pond, the title of the grantee does not extend beyond the low-water mark.<sup>6</sup> But other authorities are to the effect that the grantee takes to the center of the lake or pond which is not tide-water and is not navigable.<sup>7</sup> In conveyances calling for a lake as a line, the line at which the water usually stands when free from disturbing causes is the boundary of the land.<sup>8</sup> In California, if the owner of lands in which a tidal stream is included makes a grant of land, describing the boundary as ascending the stream, such boundary extends to the thread thereof.<sup>9</sup> It is now settled that the extent of the title of a riparian owner to the bed of a river or other body of water is a matter of local law.<sup>10</sup>

1 *Stanford v. Mangin*, 30 Ga. 355; *Austin v. Railroad Co.*, 45 Vt. 215; *Mansur v. Blake*, 62 Me. 28; *Warren v. Thomaston*, 75 Me. 329. 46 Am. Rep. 397; *Fulmer v. Williams*, 122 Pa. St. 191, 9 Am. St. Rep. 88; *Noyes v. Collins*, 92 Iowa, 566, 54 Am. St. Rep. 571; *Welles v. Bailey*, 55 Conn. 292, 3 Am. St. Rep. 48.

2 *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196; *Trustees etc. v. Schroll*, 120 Ill. 509, 60 Am. Rep. 575.

3 *Norcross v. Griffiths*, 65 Wis. 599, 56 Am. Rep. 642; *Chandas v. Mack*, 77 Wis. 573, 20 Am. St. Rep. 139. and note. See, also, to nearly same effect, *Sleeper v. Laconia*, 60 N. H. 201, 49 Am. Rep. 311; *Goff v. Congle*, 118 Mich. 307; 76 N. W. Rep. 489. Compare *Allen v. Weber*, 80 Wis. 531, 27 Am. St. Rep. 51, and note.

4 *Mayor v. Hart*, 95 N. Y. 443; *Roberts v. Baumgarten*, 110 N. Y. 380; *Sage v. Mayor*, 154 N. Y. 61. 61



Am. St. Rep. 592; Welles v. Bailey, 55 Conn. 292, 3 Am. St. Rep. 48; and see Long Beach Land etc. Co. v. Richardson, 70 Cal. 206; Steele v. Sanchez, 72 Iowa, 65, 2 Am. St. Rep. 233; St. Louis etc. Ry. Co. v. Ramsey, 53 Ark. 314, 22 Am. St. Rep. 195.

5 Fulmer v. Williams, 122 Pa. St. 191, 9 Am. St. Rep. 88. See, also, State v. Eason, 114 N. C. 787, 41 Am. St. Rep. 811; Dillingham v. Roberts, 75 Me. 460, 46 Am. Rep. 419; Groner v. Foster, 94 Va. 650; Goodwin v. Thompson, 83 Tenn. 209, 54 Am. Rep. 410.

6 See Stevens v. King, 76 Me. 197, 49 Am. Rep. 609; Snow v. Real Estate Co., 84 Me. 14, 30 Am. St. Rep. 331; Trustees etc. v. Schroll, 120 Ill. 509, 60 Am. Rep. 575; Noyes v. Collins, 92 Iowa, 566, 54 Am. St. Rep. 571; Mansur v. Blake, 62 Me. 38; Boardman v. Scott, 102 Ga. 404; Fuller v. Shed, 161 Ill. 462, 52 Am. St. Rep. 380; State v. Milk, 11 Fed. Rep. 389.

7 See Grand Rapids Ice etc. Co. v. Ice etc. Co., 102 Mich. 227, 47 Am. St. Rep. 516; Lamprey v. State, 52 Minn. 181, 38 Am. St. Rep. 541; Stoner v. Rice, 121 Ind. 51; Lembeck v. Nye, 47 Ohio St. 336, 21 Am. St. Rep. 828; Gouverneur v. National Ice Co., 134 N. Y. 355, 30 Am. St. Rep. 669; Fuller v. Dauphin, 124 Ill. 542, 7 Am. St. Rep. 388; Hardin v. Jordan, 140 U. S. 371. Compare secs. 4, 254, ante.

8 People v. Kirk, 162 Ill. 138, 53 Am. St. Rep. 277; Chicago v. Ward, 169 Ill. 392, 61 Am. St. Rep. 185.

9 Freeman v. Bellegarde, 108 Cal. 179, 49 Am. St. Rep. 76; and see Chicago v. Van Ingen, 152 Ill. 624, 43 Am. St. Rep. 285.

10 Hardin v. Jordan, 140 U. S. 371; Illinois etc. R. Co. v. Illinois, 146 U. S. 387; Shively v. Bowlby, 152 U. S. 1; Gratz v. Improvement Co., 82 Fed. Rep. 381

### § 302b. Same—Highways, etc.

As a general rule, a grant of land bounded upon a highway carries the fee in the highway to the center thereof, provided the grantor at the time owned to the center, and there are no words or specific description to show a contrary intent.<sup>1</sup> The presumption is, nothing else appearing, that

the center of the way is the boundary intended.<sup>2</sup> But this presumption is disputable, and where a grant of land is bounded "on a road," the presumption that it conveys to the center may be rebutted by proof of the establishment of monuments, and fencing and occupancy in accordance therewith.<sup>3</sup> So a deed of a lot bounded by stones "on the side of a road," and answering the call for quantity without including the road, does not convey to the center thereof.<sup>4</sup> It is, however, stated as a rule of construction that when the boundary given in a deed has physical extent, as a road, street, or other monument having width, courts will so interpret the language of the description, in the absence of any apparent contrary intent, as to carry the fee of the land to the center line of such monument.<sup>5</sup> Where a tree stands on the dividing line between adjoining proprietors, each owner has an interest in the tree equal to the part that stands upon his land, with the right to insist that the owner of the other portion shall so use his part as not unreasonably to injure or destroy the whole.<sup>6</sup>

1 *Falls v. Reis*, 74 Pa. St. 439; *Transue v. Sell*, 105 Pa. St. 604; *Rice v. Coal Co.*, 186 Pa. St. 49; *Salter v. Jones*, 39 N. J. L. 469, 23 Am. Rep. 229; *Low v. Tibbetts*, 72 Me. 92, 39 Am. Rep. 303; *Florida etc. Ry. Co. v. Brown*, 23 Fla. 104; *Wait v. May*, 48 Minn. 453; *Fraser v. Ott*, 95 Cal. 661.

2 *O'Connell v. Bryant*, 121 Mass. 557; *Haberman v. Baker*, 128 N. Y. 253; *Warbritton v. Demorett*, 129 Ind. 346; *Silvey v. McCool*, 86 Ga. 1.

3 *Dodd v. Witt*, 139 Mass. 63, 52 Am. Rep. 700.

4 *Peabody Heights Co. v. Sadtler*, 63 Md. 533, 52 Am. Rep. 519; and see, also, *Insurance Co. v. Stevens*, 87 N. Y. 287, 41 Am. Rep. 361.

5 *Rice v. Coal Co.*, 186 Pa. St. 49, 57, 64; and see *Firmstone v. Spaeter*, 150 Pa. St. 616, 30 Am. St. Rep. 851; *Jacob v. Woolfolk*, 90 Ky. 426; *Hennessy v. Murdock*, 137 N. Y. 317.

6 *Robinson v. Clapp*, 65 Conn. 365; and see *Musch v. Burkhardt*, 83 Iowa, 301, 32 Am. St. Rep. 305; sec. 4, ante.

**§ 302c. Same—Agreements as to, etc.**

Where the boundary between contiguous lands is uncertain and disputed, the owners may agree upon a certain line as the permanent boundary line, and where the agreement is followed by actual occupation according to such line as the boundary, the line will be binding upon them, and their successors in title, as the boundary.<sup>1</sup> Such agreement, though oral, is not obnoxious to the statute of frauds, nor within the meaning of the provisions of the law that regulate the manner of conveying real estate.<sup>2</sup> So the acquiescence in an actual location of a line may be of such a nature and of such continuation as to be evidence of an express agreement.<sup>3</sup> It is declared to be a settled rule, resting upon public policy, that a practical location of boundaries which has been acquiesced in for a long series of years, will not be disturbed.<sup>4</sup> A court of equity has no jurisdiction to settle the title and boundaries of land, when the plaintiff has no equity against the party who is holding the land.<sup>5</sup> And declarations as

to boundaries, by a deceased person who never owned the premises, and not made in the performance of any act in respect to such boundaries, are inadmissible in evidence.<sup>6</sup>

1 *Turner v. Baker*, 64 Mo. 218, 27 Am. Rep. 226; *Kellum v. Smith*, 65 Pa. St. 86; *Kirder v. Milner*, 99 Mo. 145, 17 Am. St. Rep. 549; *Watrous v. Morrison*, 33 Fla. 261, 39 Am. St. Rep. 139.

2 *Aycock v. Kimbrough*, 71 Tex. 333, 10 Am. St. Rep. 745; *Lecomte v. Toudouze*, 82 Tex. 208, 27 Am. St. Rep. 870; *Cavanaugh v. Jackson*, 91 Cal. 580; *Archer v. Helm*, 69 Miss. 730; *Sheets v. Sweeney*, 136 Ill. 336; *Diggs v. Kurtz*, 132 Mo. 250, 53 Am. St. Rep. 488.

3 See *Burris v. Fitch*, 76 Cal. 395; *White v. Spreckles*, 75 Cal. 610; *Berghoefer v. Frazier*, 150 Ill. 577; *St. Bede College v. Weber*, 168 Ill. 324; *Galbraith v. Lunsford*, 87 Tenn. 89; *Pickett v. Nelson*, 71 Wis. 542; *Jones v. Pashby*, 67 Mich. 459, 11 Am. St. Rep. 589; *Main v. Killinger*, 90 Ind. 165.

4 *Sherman v. Kane*, 86 N. Y. 57; *Katz v. Kaiser*, 154 N. Y. 294; and see *Magoon v. Davis*, 84 Me. 178; *Davis v. Mitchell*, 65 Tex. 623.

5 *Cresap v. Kemble*, 26 W. Va. 603; *Watson v. Ferrell*, 34 W. Va. 406; *Burns v. Mearns*, 44 W. Va. 744.

6 *Curtis v. Aaronson*, 49 N. J. L. 68, 60 Am. Rep. 584.

### § 303. Exception, Reservation, etc.

An exception is "the taking of something out of the thing granted, which would otherwise pass by the deed";<sup>1</sup> and with respect to its place in the deed, it properly follows the description of the thing granted.<sup>2</sup> If land is conveyed in general terms, an exception of a specific part, as the trees or woods, is valid, and not repugnant to the grant.<sup>3</sup> But if the part excepted was speci-

fically granted, as if a person grants ten acres in specific terms, excepting one of them, the exception is repugnant to the grant, and void.<sup>4</sup> The terms "exception" and "reservation" are often used indiscriminately, and the difference between them is, in many cases, very obscure.<sup>5</sup> But strictly speaking, an exception is always a part of the thing granted, and of a thing in esse at the time;<sup>6</sup> whereas a reservation is something newly created or reserved out of the thing granted, that was not in esse before,<sup>7</sup> such as a rent,<sup>8</sup> or an easement.<sup>9</sup> A reservation cannot be made by parol;<sup>10</sup> and a reservation to a stranger is void.<sup>11</sup> It is for the benefit of the grantor and his successors, and not for that of persons claiming title to property not conveyed by the deed, and derived from other sources.<sup>12</sup> Generally, the same rules of construction apply to a reservation or implied grant as to an express grant.<sup>13</sup> The words, "reserving to myself the right of passing and repassing, and repairing my aqueduct logs forever through a culvert," were held to vest an estate for life only;<sup>14</sup> so of the words, "reserving to the grantor the use and control, etc., during his natural life";<sup>15</sup> and so of a reservation "for the use of our mother."<sup>16</sup> A reservation of stone, timber, etc., to be removed in a certain time, is held to expire with that time.<sup>17</sup> A reservation of mines implies support of the land;<sup>18</sup> so a reservation of wood and trees on the land implies a

right of soil for their support and growth until cut and a right to enter and cut them.<sup>19</sup> A reservation may be made in the premises, the clause of grant, the habendum, or reddendum.<sup>20</sup>

1 2 Washburn on Real Property, 639; and see Meserve v. Meserve, 19 N. H. 240; Roberts v. Robertson, 53 Vt. 690, 38 Am. Rep. 710; Richardson v. Palmer, 38 Vt. 223; Eiseley v. Spooner, 23 Neb. 470, 8 Am. St. Rep. 128; Gould v. Howe, 131 Ill. 490; Fancy v. Scott, 2 Moody & R. 335. The operation of an exception is to retain in the grantor some portion of his former estate, which by the exception is taken out of or excluded from the grant. Whatever is thus excluded remains in him as of his former right or title, because it is not granted: Ashcroft v. Eastern R. R. Co., 126 Mass. 196, 30 Am. Rep. 672.

2 See 2 Greenleaf's Cruise on Real Property, 648; 2 Washburn on Real Property, 639.

3 Sheppard's Touchstone, 78; 4 Kent's Commentaries, 468; Sprague v. Snow, 4 Pick. 54; Munn v. Worrall, 53 N. Y. 44, 13 Am. Rep. 470; and see Cornwell v. Thurston, 59 Mo. 156; Crosby v. Montgomery, 38 Vt. 238; Dolan v. Trelevan, 31 Wis. 147; Moulton v. Trafton, 64 Me. 218; Stockwell v. Couillard, 129 Mass. 231; Wait v. Baldwin, 60 Mich. 622, 1 Am. St. Rep. 551.

4 4 Kent's Commentaries, 468; and see Cutler v. Tufts, 3 Pick. 272; Wade v. Howard, 6 Pick. 500; Darling v. Crowell, 6 N. H. 421; Moore v. Fletcher, 16 Me. 63.

5 See Winthrop v. Fairbanks, 41 Me. 307; State v. Wilson, 42 Me. 9; Roberts v. Robertson, 53 Vt. 690, 38 Am. Rep. 710.

6 Coke on Littleton, 47b; Whitaker v. Brown, 46 Pa. St. 197; Doe v. Lock, 4 Nev. & M. 807. Compare Hurd v. Curtis, 7 Met. 94; Durham etc. v. Walker, 2 Ad. & E., N. S., 940.

7 Doe v. Lock, 4 Nev. & M. 807; State v. Wilson, 42 Me. 9; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290; Ashcroft v. Eastern R. R. Co., 126 Mass. 196, 30 Am. Rep. 672; Langdon v. Mayor etc., 6 Abb.

N. C. 321, 322; *Eiseley v. Spooner*, 23 Neb. 470, 8 Am. St. Rep. 128; *Gould v. Howe*, 131 Ill. 490.

8 1 Wood on Conveyances, 225; sec. 106, ante; *Stockwell v. Couillard*, 129 Mass. 231.

9 *Choate v. Burnham*, 7 Pick. 274; *Dyer v. Sandford*, 9 Met. 395; and see *Smith v. Ladd*, 41 Me. 314; *Reidinger v. Cleveland Iron Min. Co.*, 39 Mich. 30; *Hart v. Conner*, 25 Conn. 331. Minerals are a frequent subject of exception and reservation: See *Gibson v. Tyson*, 5 Watts, 34; *Midland Ry. v. Checkley*, L. R. 4 Eq. 19; sec. 6, ante.

10 *Gibbons v. Dillingham*, 5 Eng. Rep. 9; *Wintermute v. Light*, 46 Barb. 278; *Turner v. Cool*, 23 Ind. 56. But see *Backenstoss v. Stahler*, 33 Pa. St. 251.

11 *Hornbeck v. Westbrook*, 9 Johns. 73.

12 *Moulton v. Faught*, 41 Me. 298.

13 *Ashcroft v. Eastern R. R. Co.*, 126 Mass. 196, 30 Am. Rep. 672; *French v. Carhart*, 1 N. Y. 96. Under a reservation of the right to "a supply of spring water by means of a hydraulic ram, wheel, or other process of forcing water," the party entitled may substitute a windmill for a wheel previously used: *Richardson v. Clements*, 89 Pa. St. 503, 33 Am. Rep. 784. Compare *Onthank v. Lake Shore etc. R. R. Co.*, 71 N. Y. 194, 27 Am. Rep. 35.

14 *Ashcroft v. Eastern R. R. Co.*, 126 Mass. 196, 30 Am. Rep. 672. A deed of land to A, her heirs and assigns forever, in consideration of love, goodwill, and affection, reserving the use of the lands during the grantor's natural life, conveys the fee in presenti, subject to the life estate: *Crib v. Rogers*, 12 S. C. 564, 32 Am. Rep. 511; and see *Coley v. Coley*, 19 Conn. 114; *Waugh v. Waugh*, 84 Pa. St. 350, 24 Am. Rep. 191; *Koen v. Bartlett*, 41 W. Va. 559, 56 Am. St. Rep. 884; *Graves v. Atwood*, 52 Conn. 512, 52 Am. Rep. 610.

15 *Richardson v. York*, 14 Me. 216.

16 *Keeler v. Wood*, 30 Vt. 242.

17 *Saltonstall v. Little*, 90 Pa. St. 422, 35 Am. Rep. 683; *Judevine v. Goodrich*, 35 Vt. 19; *Pease v. Gibson*, 6 Me. 84; *Boisubin v. Reed*, 2 Keyes, 323; 1 Abb. Ct. App. 161; *Lancustrine etc. Co. v. Lake Guano etc. Co.*, 82 N. Y. 482. But see contra, *Irons v. Webb*, 41 N. J. L. 203, 32 Am. Rep. 193; and compare *Hort v. Strat-*

ton Mills, 54 N. H. 109, 20 Am. Rep. 119; Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776.

18 Caledonia etc. Min. Co. v. Sprot, 39 Eng. L. & Eq. 16; and see secs. 6, 146, ante.

19 Clap v. Draper, 4 Mass. 266; Howard v. Lincoln, 13 Me. 122; Putnam v. Tuttle, 10 Gray, 48; Wait v. Baldwin, 60 Mich. 622, 1 Am. St. Rep. 551; Golden v. Glock, 57 Wis. 118, 46 Am. Rep. 32.

20 Stambaugh v. Hollabaugh, 10 Serg. & R. 362.

### § 303a. Same—Construction, etc.

There is more or less repugnancy in the provisions of all deeds in which a part of the thing embraced in the general description is excepted from the operation of the instrument. But where it clearly appears to have been the intention of the parties to except part of the property embraced in the general description, effect will be given to such intent, unless the repugnancy is such as to render the exception void.<sup>1</sup> A description of the lands as a particular quarter section, "except two acres in the southeast corner," is held to be sufficiently certain and definite, the exception in the description being construed to mean two acres, lying in a square, and bounded by four equal sides.<sup>2</sup> The words "reserving" and "excepting," in a deed, are not conclusive in determining whether an exception or reservation is intended. This is determined by the character and effect of the provision itself.<sup>3</sup> A reservation in favor of the grantor is construed most strongly against him. It is accordingly held that the reservation of a right of way through and over



an alleyway does not reserve the alleyway itself, but merely the right to pass through it.<sup>4</sup> Nor can a reservation in a deed be extended beyond its terms. And when a city conveys land to a railroad company, and in the deed reserves the right to cross the railroad tracks with its streets when the city shall have made an addition thereto of certain land, it cannot enforce such reservation until it has made such addition.<sup>5</sup> A reservation in a deed of all "metals and minerals," etc., and of "all valuable earths, clays, stones, paints, and substances for the manufacture of paints," was construed to cover clay for making bricks.<sup>6</sup> But a reservation of "all minerals" was held not to include petroleum oil.<sup>7</sup> In every grant of lands bounded by navigable waters where the tide ebbs and flows, made by the crown or the state as trustees for the public, there is reserved, by implication, the right to so improve the waterfront as to aid navigation for the benefit of the general public, without compensation to the riparian owner.<sup>8</sup> A reservation in a grant, inconsistent therewith, and which tends to defeat the purpose thereof, is void, as a repugnant condition.<sup>9</sup>

1 *Cravens v. White*, 73 Tex. 577, 15 Am. St. Rep. 803; *Bassett v. Budlong*, 77 Mich. 338, 18 Am. St. Rep. 404.

2 *Green v. Jordan*, 83 Ala. 220, 3 Am. St. Rep. 711.

3 *Gould v. Howe*, 131 Ill. 490; and so, to same effect, *Bassett v. Budlong*, 77 Mich. 338, 18 Am. St. Rep. 404, and note.

4 *Grafton v. Moir*, 130 N. Y. 465, 27 Am. St. Rep. 533; and see *Kripp v. Curtis*, 71 Cal. 63; *Bodfish v. Bodfish*, 105 Mass. 319; *Maple v. John*, 42 W. Va. 30, 57 Am. St. Rep. 839.

5 *Fort Wayne v. Railway Co.*, 132 Ind. 558, 32 Am. St. Rep. 277. See *Hedderly v. Johnson*, 42 Minn. 443, 18 Am. St. Rep. 521.

6 *Foster v. Runk*, 109 Pa. St. 291, 58 Am. Rep. 720.

7 *Dunham v. Kirkpatrick*, 101 Pa. St. 36, 47 Am. Rep. 696. Contra, *Murray v. Allred*, 100 Tenn. 100, 66 Am. St. Rep. 740. See sec. 6, ante. It is also held in *Murray v. Allred* that natural gas is a mineral within a similar reservation.

8 *Sage v. Mayor*, 154 N. Y. 61, 61 Am. St. Rep. 592.

9 *Riddle v. Charlestown*, 43 W. Va. 796.

### § 303b. Restrictions.

Where a grantee binds himself by a covenant in his deed, limiting the use of the land purchased in a particular manner so as not to interfere with the trade or business of the grantor, and the covenant is valid as between the parties, it is also binding upon and may be enforced against a grantee of the covenantor, taking title with notice of the restriction.<sup>1</sup> A restriction that land shall not be used for manufacturing, "or for any nauseous or offensive business," has been sustained as reasonable and valid.<sup>2</sup> A restriction as to the sale of liquors on the premises conveyed is a covenant running with the land, and therefore effective against a tenant or assignee of the vendee.<sup>3</sup> Where a restriction is inserted in a deed against undesirable structures or buildings, it will be presumed to have been in-

serted for the purpose of protecting rights which the grantor had in adjacent property.<sup>4</sup>

1 *Hodge v. Sloan*, 107 N. Y. 244, 1 Am. St. Rep. 816; and see *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189; *Fresno Canal Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112.

2 *Whitney v. Railroad Co.*, 11 Gray, 359, 71 Am. Dec. 715; and see *Trustees v. Lynch*, 70 N. Y. 440, 26 Am. Rep. 615; *Brown v. Railway Co.*, L. R. 2 Q. B. Div. 406; *London etc. Ry. Co. v. Gomm*, L. R. 20 Ch. Div. 562.

3 *Sutton v. Head*, 86 Ky. 156, 9 Am. St. Rep. 274; and see *Smith v. Barrie*, 56 Mich. 314, 56 Am. Rep. 391; *Carter v. Williams*, L. R. 9 Eq. Cas. 678; secs. 202 et seq., ante.

4 *Post v. Weil*, 115 N. Y. 361, 12 Am. St. Rep. 809; *Countryman v. Deck*, 13 Abb. N. C. 110.

### § 304. Rules of Construction, Generally.

It is the province of the court to determine the force and legal effect of a deed,<sup>1</sup> and its legal effect is only deducible from its terms, according to the intent of the parties at the time of making it.<sup>2</sup> Questions relative to the location of the thing granted, the extent of its boundaries, the monuments intended by certain names, etc., are for the determination of the jury.<sup>3</sup> A leading rule of construction is, that the intention of the parties, as ascertained by the deed itself, will, if possible, be supported where this can be done consistently with the rules of law.<sup>4</sup> In order to arrive at the intention of the parties, the court will regard their situation and the circumstances attending the transaction.<sup>5</sup> The grammatical sense is not to be adhered to where a contrary in-

tent is apparent;<sup>6</sup> and punctuation will be wholly disregarded, unless all other means fail.<sup>7</sup> Ambiguous words are to be construed most favorably to the grantee;<sup>8</sup> and if the deed will inure several ways, he may elect which way to take it.<sup>9</sup> Words in a deed which are repugnant to the other parts of the deed, and to the general intent of the parties, will be rejected as insensible.<sup>10</sup> In order to effect the intention of the parties, "and" may sometimes be construed to mean "or," and vice versa.<sup>11</sup> Two deeds executed at the same time, between the same parties, and relating to the same subject matter, should be construed together as one.<sup>12</sup> If a deed cannot operate in the way intended by the parties, it will be so construed as to operate, if possible, in some other way.<sup>13</sup> But if the words are so unmeaning or repugnant as to render the intention of the parties wholly unascertainable, the deed will be void for uncertainty.<sup>14</sup> The rule that the words of a deed shall be construed most strongly against the grantor, does not mean that the words are to be twisted out of their proper meaning, but only that, in case of ambiguity, the meaning most favorable to the grantee is to be adopted, provided no wrong or injustice is thereby done to anyone.<sup>15</sup>

1 *Piles v. Bouldin*, 11 Wheat. 325; and see *Thornberry v. Churchill*, 4 T. B. Mon. 29, 16 Am. Dec. 125; *Abbott v. Abbott*, 51 Me. 575, 581; *Hurley v. Morgan*, 1 Dev. & B. 425, 28 Am. Dec. 579; *Henderson v. Mayor etc.*, 8 Md. 352; *Harris v. Doe*, 4 Blackf. 377.

2 Frier v. Jackson, 8 Johns. 495; Kimball v. Temple, 25 Cal. 449; Long v. Wagoner, 47 Mo. 178; Stanley v. Greene, 12 Cal. 148; Hodges v. Strong, 10 Vt. 247; Richardson v. Palmer, 38 N. H. 218; Donahue v. Case, 61 N. Y. 631; Wilkins v. Young, 144 Ind. 1, 55 Am. St. Rep. 162.

3 Frier v. Jackson, 8 Johns. 495; Clark v. Wagoner, 70 N. C. 706; Colton v. Seavey, 22 Cal. 496; Williston v. Morse, 10 Met. 17.

4 Parkhurst v. Smith, Willes, 332; Kenworthy v. Tullis, 3 Ind. 96; Mulford v. La Frame, 26 Cal. 88; Mills v. Catlin, 22 Vt. 98; Collins v. Lavelle, 44 Vt. 230; Allen v. Holton, 20 Pick. 463; Rutherford v. Tracey, 48 Mo. 325, 8 Am. Rep. 104; Jackson v. Myers, 3 Johns. 388, 3 Am. Dec. 504; Roberts v. Robertson, 53 Vt. 690, 38 Am. Rep. 710; Havens v. Sea Shore Land Co., 47 N. J. Eq. 365; Lowdermilk v. Bostick, 98 N. C. 299; Farnam v. Thompkins, 171 Ill. 519; Bassett v. Budlong, 77 Mich. 338, 18 Am. St. Rep. 404.

5 Wolfe v. Scarborough, 2 Ohio St. 361; Dunn v. English, 23 N. J. L. 126; Abbott v. Abbott, 53 Me. 356; and see Derby v. Hall, 2 Gray, 243; Mumford v. Getting, 7 Com. B., N. S., 305; Share v. Wilson, 9 Clark & F. 569; Kinney v. Hooker, 65 Vt. 333, 36 Am. St. Rep. 864, and note.

6 Hancock v. Watson, 18 Cal. 137; Jackson v. Topping, 1 Wend. 388. Compare Grey v. Pearson, 6 H. L. Cas. 61; Deering v. Long Wharf, 25 Me. 51; Waugh v. Middleton, 8 Ex. 357.

7 Ewing v. Burnet, 11 Pet. 41; Bruensman v. Carroll, 52 Mo. 213; and compare White v. Smith, 33 Pa. St. 186; English v. McNair, 34 Ala. 40; Churchill v. Reamer, 8 Bush, 260.

8 Watson v. Boylston, 5 Mass. 411; Rung v. Schoneberger, 2 Watts. 23, 26 Am. Dec. 95; Hogg's Appeal, 22 Pa. St. 479; Johnson v. Webster, 31 Eng. L. & Eq. 98; Coffing v. Taylor, 16 Ill. 457. Compare Palmer v. Warren Ins. Co., 1 Story, 369; Falley v. Giles, 29 Ind. 114. Exceptions and restrictions are also to be construed favorably to the grantee: Duryea v. Mayor etc., 62 N. Y. 592.

9 *Esty v. Baker*, 50 Me. 325; *Jackson v. Hudson*, 3 Johns. 375, 3 Am. Dec. 500; *Sharp v. Thompson*, 100 Ill. 447, 39 Am. Rep. 61.

10 *Jackson v. Clark*, 7 Johns. 217; *State v. Trask*, 6 Vt. 355, 27 Am. Dec. 554; *Worthington v. Hylyer*, 4 Mass. 196; *Ferguson v. Harwood*, 7 Cranch, 414; *Cake v. Cake*, 127 Pa. St. 400; *Sherwood v. Whiting*, 54 Conn. 330, 1 Am. St. Rep. 116; *Groves v. Atwood*, 52 Conn. 512, 52 Am. Rep. 610; and see *White v. Gay*, 9 N. H. 126, 31 Am. Dec. 224; *Masten v. Olcott*, 101 N. Y. 152.

11 *Coke on Littleton*, 225a; *Jackson v. Topping*, 1 Wend. 388, 19 Am. Dec. 515; *White v. Crawford*, 10 Mass. 183.

12 *Cornell v. Todd*, 2 Denio, 130; *Kruse v. Prindle*, 8 Or. 158; and see *Pepper v. Haight*, 20 Barb. 429; *Gammon v. Freeman*, 31 Me. 243; *Jackson v. McKenney*, 3 Wend. 233, 20 Am. Dec. 690.

13 2 *Greenleaf's Cruise on Real Property*, 601; *Doe v. Woodroffe*, 10 Mees. & W. 608; *Thomas v. Hatch*, 3 Sum. 170; *Bryan v. Bradley*, 16 Conn. 474; *Cross v. Commission Co.*, 153 Ill. 499, 46 Am. St. Rep. 902.

14 *Mason v. White*, 11 Barb. 173; *Bean v. Thompson*, 19 N. H. 290; *Shackleford v. Bailey*, 35 Ill. 387; *United States v. King*, 3 How. 773; *Mesick v. Sunderland*, 6 Cal. 297; *Cravens v. White*, 73 Tex. 577, 15 Am. St. Rep. 803. Parol evidence is admissible to explain or remove latent ambiguities in a deed: *Doolittle v. Blakesley*, 4 Day, 265, 4 Am. Dec. 218; *Atkinson v. Cummins*, 9 How. 479; *Glanton v. Anthony*, 15 Ark. 543; *Scanlon v. Wright*, 13 Pick. 523, 25 Am. Dec. 344. But ambiguities patent or apparent upon the face of the deed cannot be explained by parol evidence, and must be removed, if at all, by a sound construction of the deed itself: *Storer v. Freeman*, 6 Mass. 435; *Hardy v. Matthews*, 38 Mo. 121; *Norris v. Hunt*, 51 Tex. 615; *Keller v. Keller*, 80 Wis. 327; *Owen v. Henderson*, 16 Wash. 39, 58 Am. St. Rep. 17. Compare *Dygert v. Platts*, 25 Wend. 402; *Clayton v. Nugent*, 13 Mees. & W. 200.

15 *Clark v. Beloff*, 71 Conn. 237.

**§ 304a. Same—Continued.**

The general rule is, that a deed must be upheld if possible, and the terms and phraseology of description will be interpreted to that end, if this can reasonably be done consistently with the principles and rules of law.<sup>1</sup> When the granting clause of a deed is silent as to the estate intended to be conveyed, resort may be had to the habendum to ascertain the intention of the grantor in that regard. It cannot, however, be used either to enlarge or diminish the estate specifically defined in the granting clause, for if it is repugnant to that clause it is void, but if that clause is either silent or ambiguous, then the habendum becomes the standard by which the estate granted must be measured.<sup>2</sup> In arriving at a conclusion as to whether a written instrument, doubtful in its character, is a deed or a will, the controlling inquiry is the intention of the maker as gathered from the entire language used in the instrument.<sup>3</sup> But it has been further held that all the attending circumstances may be put in proof as aids in determining the question, whenever the paper is so framed as to postpone actual enjoyment under it until the death of the maker.<sup>4</sup> If it appears that the maker did not intend any interest whatever to vest before his death, the law regards the instrument as a will.<sup>5</sup> In case of conflict between the provisions of a deed conveying land, and the terms of a previously executed contract

to convey the same land, the deed controls as the last expression of the will of the parties.<sup>6</sup> The word "heirs" in a deed may be construed to mean "children," when it clearly appears from other parts of the instrument that it is not used in its purely legal, technical sense.<sup>7</sup> The words "more or less" and "about," used in connection with quantity or as qualifying distances, are words of precaution and safety intended to cover some unimportant inaccuracy.<sup>8</sup> The words "from" or "to" an object, as a general rule, exclude the object.<sup>9</sup> The word "half," used in describing lands, is construed as meaning half in quantity, unless the context or surrounding facts and circumstances show a contrary intention.<sup>10</sup> The word "descend," used in a conveyance, has been construed to mean the same as "go to."<sup>11</sup> In order to create a fee, it is not essential that the word "heirs" be located in any particular part of the grant.<sup>12</sup> A deed "under and subject" to the lien of a mortgage securing the grantor's bond creates a covenant on the part of the grantee to indemnify the grantor against the mortgage debt.<sup>13</sup>

1 *Edwards v. Bowden*, 99 N. C. 80, 6 Am. St. Rep. 487; *Melick v. Pidcock*, 44 N. J. Eq. 525, 6 Am. St. Rep. 901.

2 *Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365; *Staffordville Gravel Co. v. Newell*, 53 N. J. L. 412; and so, to same effect, *Bodine v. Arthur*, 91 Ky. 53, 34 Am. St. Rep. 162; *Rives v. Mansfield*, 96 Mo. 394; *Fogarty v. Stack*, 86 Tenn. 610; *Doren v. Gillum*, 136 Ind. 134;

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Downing v. Birney, 112 Mich. 474; Powers v. Hibbard, 114 Mich. 533.

3 Phillips v. Lumber Co., 94 Ky. 445, 42 Am. St. Rep. 367.

4 Lee v. Shivers, 70 Ala. 288; Sharp v. Hall, 86 Ala. 110, 11 Am. St. Rep. 28; Mealing v. Pace, 14 Ga. 596, 630.

5 Simon v. Wildt, 84 Ky. 157.

6 Neal v. Hopkins, 87 Md. 19.

7 Griswold v. Hicks, 132 Ill. 494, 22 Am. St. Rep. 549; Heath v. Hewitt, 127 N. Y. 166, 24 Am. St. Rep. 438; Waddell v. Waddell, 99 Mo. 338, 17 Am. St. Rep. 575; Downing v. Birney, 112 Mich. 474.

8 Oakes v. De Lancey, 133 N. Y. 227, 28 Am. St. Rep. 628; Tyson v. Hardesty, 29 Md. 305; Baltimore etc. Soc. v. Smith, 54 Md. 187, 39 Am. Rep. 374; Stevens v. McKnight, 40 Ohio St. 341; Paine v. Upton, 87 N. Y. 327, 41 Am. Rep. 371.

9 Bonney v. Morrill, 52 Me. 252.

10 Hartford etc. Min. Co. v. Mining Co., 80 Mich. 491; Owen v. Henderson, 16 Wash. 39, 58 Am. St. Rep. 17.

11 Tate v. Townsend, 61 Miss. 316; Doren v. Gillum, 136 Ind. 134. Construction of word "divided" in deed: See Ford v. Unity Church Soc., 120 Mo. 498, 41 Am. St. Rep. 711; meaning of term "execution," in conveyancing: Brown v. Westerfield, 47 Neb. 399, 53 Am. St. Rep. 532.

12 Melick v. Pidcock, 44 N. J. Eq. 525, 6 Am. St. Rep. 901.

13 Green v. Rick, 121 Pa. St. 130, 6 Am. St. Rep. 760.

### § 305. Construction of Public Grant.

In the case of a grant by the sovereign or government, the construction is always against the grantee, and the grant is taken most beneficially for the government.<sup>1</sup> But this rule is strictly applicable only in cases of real uncertainty or ambiguity in the terms of the grant;<sup>2</sup> and more

properly to a grant of some prerogative right to an individual, to be held by him as a franchise, and which is intended to become private property in his hands.<sup>3</sup> It has no application where the grant is made for a valuable consideration;<sup>4</sup> and, generally speaking, a legislative grant of land in this country is to be fairly and liberally construed in favor of the grantee.<sup>5</sup>

1 *Gildart v. Gladstone*, 11 East, 685; *Jackson v. Reeves*, 3 Caines, 293; *Kennedy v. M'Cartney*, 4 Port. 141; *Mayor etc. v. Ohio etc. R. R. Co.*, 26 Pa. St. 355. See sec. 250, ante.

2 *Charles River Bridge v. Warren Bridge*, 11 Pet. 589.

3 *Martin v. Waddell*, 16 Pet. 367, 411; *Dubuque R. R. v. Litchfield*, 23 How. 66, 88; *Commonwealth v. Roxbury*, 9 Gray, 451, 492; *Lansing v. Smith*, 4 Wend. 9, 21 Am. Dec. 89.

4 *Charles River Bridge v. Warren Bridge*, 11 Pet. 589.

5 *Croghan v. Nelson*, 3 How. 187; *Hyman v. Read*, 13 Cal. 444; *Stringer v. Young*, 3 Pet. 320. Compare *San Francisco v. Straut*, 84 Cal. 124; *Oakland v. Oakland Water Front Co.*, 118 Cal. 173.

### § 306. What Passes as Appurtenant.

It is a well-established rule that the grant of a thing passes, as incident thereto, everything necessary to its enjoyment, although the thing only is mentioned.<sup>1</sup> Everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by

the conveyance.<sup>2</sup> Thus a conveyance of land, by necessary legal consequence, carries the buildings thereon.<sup>3</sup> And the grant of a house passes the land on which it stands.<sup>4</sup> The grant of a mill and its "appurtenances" passes not merely the building, but all the land under the mill and necessary for its use;<sup>5</sup> and also the waters, flood-gates, etc., which are necessary for the enjoyment of the mill.<sup>6</sup> But the soil of a way immemorially used for the purpose of access to the mill from the highway will not pass as appurtenant.<sup>7</sup> The incidents which pass as appurtenances must be open and visible.<sup>8</sup> But it is not essential that at the time of the grant they should be in actual use in connection with the thing granted.<sup>9</sup> Nor are they limited to those absolutely necessary to the enjoyment of the property conveyed;<sup>10</sup> it is sufficient, if full enjoyment of the property cannot be had without them.<sup>11</sup> Ordinarily, whatever easements and privileges legally appertain to property pass by the conveyance of the property itself, without any additional words.<sup>12</sup> But a distinction is made between easements which are apparent and continuous, as a drain or sewer which is used continuously without the intervention of man,<sup>13</sup> and those which are nonapparent and noncontinuous, as a right of way which can only be used by the intervention of man, repeated at intervals when user is desired.<sup>14</sup> The former are held to pass on the

severance of two tenements as appurtenant without the use of the word "appurtenances";<sup>15</sup> but the latter will pass only by words sufficient to create a new easement, and the word "appurtenances" is not sufficient.<sup>16</sup> The term "appurtenant" signifies something appertaining to another thing as principal, and which passes as incident thereto;<sup>17</sup> and therefore land cannot be appurtenant to land, or a messuage to a messuage, strictly speaking.<sup>18</sup>

1 *Pomfret v. Ricroft*, 1 Wms. Saund. 323a, note; *Cocheco etc. Co. v. Whittier*, 10 N. H. 305; *Wise v. Wheeler*, 6 Ired. 196; *Murphy v. Campbell*, 4 Pa. St. 484; *Winchester v. Hees*, 35 N. H. 33; *James v. Jenkins*, 34 Md. 1, 6 Am. Rep. 300; *Charleston etc. R. R. Co. v. Leech*, 33 S. C. 175, 26 Am. St. Rep. 667; *Badger Lumber Co. v. Power Co.*, 48 Kan. 182, 30 Am. St. Rep. 301.

2 *Sparks v. Hess*, 15 Cal. 196; *Dunklee v. Wilton R. R. Co.*, 24 N. H. 489; *Allen v. Scott*, 21 Pick. 25, 32 Am. Dec. 238; *Sheets v. Selden*, 2 Wall. 187; *Brigham v. Smith*, 4 Gray, 297.

3 *Isham v. Morgan*, 9 Conn. 374, 23 Am. Dec. 361; and see *Goodrich v. Jones*, 2 Hill, 142.

4 *Wilson v. Hunter*, 14 Wis. 683; and see *Wooley v. Groton*, 2 Cush. 305; *Hare v. Horton*, 5 Barn. & Adol. 715; *Davis v. Handy*, 37 N. H. 65; *Pickering v. Stapler*, 5 Serg. & R. 110. A grant of "warren" may pass the soil: *Earl Beauchamp v. Winn*, L. R. 6 Eng. & Ir. App. 223; 6 Eng. Rep. 37. The phrase "a warren of conies" will only pass the franchise: *Earl Beauchamp v. Winn*, L. R. 6 Eng. & Ir. App. 223; 6 Eng. Rep. 37.

5 *Whitney v. Olney*, 3 Mason, 280; *Gilson v. Brockway*, 8 N. H. 465; *Forbush v. Lombard*, 13 Met. 109.

6 *Wetmore v. White*, 2 Caines Cas. 87; *Crosby v. Bradbury*, 20 Me. 61; *Thompson v. Banks*, 43 N. H. 540; *Strickler v. Todd*, 10 Serg. & R. 63, 13 Am. Dec. 649; *Simmons v. Cloonan*, 81 N. Y. 557.

7 Leonard v. White, 7 Mass. 8, 5 Am. Dec. 19.

8 Simmons v. Cloonan, 81 N. Y. 557; and see Butterworth v. Crawford, 46 N. Y. 349, 7 Am. Rep. 352. An appurtenance which is conveyed by general terms in a grant must be something which necessarily attaches to the lands conveyed, as a matter of right; and such terms do not convey a right or easement which the grantor was not authorized to impose upon adjoining lands: Green v. Collins, 86 N. Y. 246, 40 Am. Rep. 531; Bumstead v. Cook, 169 Mass. 410, 61 Am. St. Rep. 293.

9 Simmons v. Cloonan, 81 N. Y. 557.

10 Simmons v. Cloonan, 81 N. Y. 557. The term "appurtenances" does not include land beyond boundaries: Woodhull v. Rosenthal, 61 N. Y. 382.

11 Simmons v. Cloonan, 81 N. Y. 557; and see Dunklee v. Wilton R. R. Co., 24 N. H. 489.

12 Riddle v. Littleton, 53 N. H. 503; and see United States v. Appleton, 1 Sum. 492; Hyde Park Light Co. v. Brown, 172 Ill. 329; Bumstead v. Cook, 169 Mass. 410, 61 Am. St. Rep. 293; Jackson v. Hathaway, 15 Johns. 447; Plant v. James, 5 Barn. & Adol. 791; Green v. Collins, 4 Hun, 474; Booth v. Alcock, L. R. 8 Ch. App. 663; Leech v. Schrueder, L. R. 9 Ch. App. 463.

13 See tit. Easements.

14 Parsons v. Johnson, 68 N. Y. 66, 23 Am. Rep. 149; Poedon v. Boston, L. R. 1 Q. B. 156; Lampman v. Milks, 21 N. Y. 505.

15 Fetters v. Humphreys, 19 N. J. Eq. 471.

16 Fetters v. Humphreys, 19 N. J. Eq. 471; Russell v. Harford, L. R. 2 Eq. Cas. 507; Langley v. Hammond, L. R. 3 Ex. 161; Parsons v. Johnson, 68 N. Y. 66, 23 Am. Rep. 149; and see Plant v. James, 6 Nev. & M. 282; 4 Ad. & E. 749.

17 Harris v. Elliott, 10 Pet. 25, 54; Woodhull v. Rosenthal, 61 N. Y. 390; Badger Lumber Co. v. Marion etc. Co., 48 Kan. 182, 30 Am. St. Rep. 301; Crooker v. Benton, 93 Cal. 365. Compare Coburn v. Ames, 52 Cal. 396; Matter of New York Cent. R. R. Co., 49 Barb. 505.

18 Hall v. Benner, 1 Penr. & W. 42, 21 Am. Dec. 394; Van O'Linda v. Lothrop, 21 Pick. 292, 32 Am. Dec. 261; Leonard v. White, 7 Mass. 8, 5 Am. Dec. 19;

and see *Ammidown v. Granite Bank*, 8 Allen, 291; *New Orleans Pac. Ry. v. Parker*, 143 U. S. 42; *Woodhull v. Rosenthal*, 61 N. Y. 382.

### § 306a. Same—Continued.

Appurtenances to land will pass by a conveyance of the land, although the words "with the appurtenances," are not used.<sup>1</sup> But an easement, when not expressly described in the conveyance, must actually belong to the estate conveyed in order to pass by implication.<sup>2</sup> An easement not of strict necessity does not pass by implied grant, unless it be apparently permanent, obvious, and continuous.<sup>3</sup> It is held that a right to flow land will pass by a deed of mill property.<sup>4</sup> Also, if mill property is granted, an easement in other lands of the grantor, used in the enjoyment of the property, will pass by the grant as an appurtenance.<sup>5</sup> So any water right acquired and used for a beneficial purpose in connection with realty is an appurtenance thereto, and as such, unless reserved, passes with a conveyance of the land.<sup>6</sup> Thus, when the right to the use of a ditch and water exists in favor of land conveyed by deed, and without which the land would be practically valueless, such right will pass with the deed, with or without the use of the word "appurtenances" therein.<sup>7</sup> Poles planted in the streets of a city, necessary to transmit electricity from a powerhouse, are held to be appurtenant thereto within the meaning of the mechanics' lien law.<sup>8</sup> The

grant of a spring carries so much of the land containing it as is essential to its customary enjoyment, but does not include a shade tree ten feet from the head of the spring on the land of another person, although the roots of the tree extend to the spring, and the branches overhang it.<sup>9</sup>

1 Shelby v. Railroad Co., 143 Ill. 385.

2 Philbrick v. Ewing, 97 Mass. 133; Johnson v. Knapp, 146 Mass. 70; Spaulding v. Abbott, 55 N. H. 423; Whiting v. Gaylord, 66 Conn. 337, 50 Am. St. Rep. 87; Bumstead v. Cook, 169 Mass. 410, 61 Am. St. Rep. 293.

3 Bonelli v. Blakemore, 66 Miss. 136, 14 Am. St. Rep. 550. See sec. 136a, ante.

4 Berry v. Billings, 44 Me. 416, 69 Am. Dec. 107.

5 Jarvis v. Steele Milling Co., 173 Ill. 192, 64 Am. St. Rep. 107.

6 Sweetland v. Olsen, 11 Mont. 27.

7 Simmons v. Winters, 21 Or. 35, 28 Am. St. Rep. 727; Crooker v. Benton, 93 Cal. 365.

8 Badger Lumber Co. v. Power Co., 48 Kan. 182, 30 Am. St. Rep. 301.

9 Lucas v. Bishop, 15 Lea, 165, 54 Am. Rep. 410.

### § 307. What the Term "Messuage" Includes.

The word "messuage," when used as a term descriptive of the thing intended to be conveyed, will generally include the dwelling-house and all buildings attached or adjoining to it;<sup>1</sup> also the curtilage, garden, orchard, etc., and the land upon which the dwelling-house is built.<sup>2</sup> The grant of a "dwelling-house" or "cottage" will pass the land upon which it stands and also the curtil-

age.<sup>3</sup> So by the grant of a "wharf and dock," the flats in front of them may pass, as well as the dock and the land under the wharf.<sup>4</sup> The conveyance of a "farm" will pass a messuage, arable land, meadow, pasture, wood, etc., thereto belonging.<sup>5</sup> The word "land," in its legal signification, includes any ground, soil, or earth whatever, as meadows, pastures, woods, moors, waters, marshes, furzes, heaths, and also all houses and other buildings erected thereon, and they will pass with a grant of the land.<sup>6</sup> The words "lands, tenements, and hereditaments" will pass every species of real property.<sup>7</sup>

1 2 Greenleaf's Cruise on Real Property, 642.

2 2 Greenleaf's Cruise on Real Property, 642; Sheppard's Touchstone, 94; Smith v. Martin, 2 Wms. Saund. 401; and see Suines v. Wilson, 4 Blackf. 334.

3 Hilton v. Gilman, 15 Me. 263; Emerton v. Selby, 2 Ld. Raym. 1015. Compare Saltonstall v. Brown, 3 Met. 423; Wise v. Wheeler, 6 Ired. 196.

4 Doane v. Broad Street Assn., 6 Mass. 332.

5 Sheppard's Touchstone, 93. Compare Bradshaw v. Ellis, 2 Dev. & B. 20; Burke v. Chamberlain, 22 Md. 308.

6 2 Greenleaf's Cruise on Real Property, 643; Coombs v. Jordan, 3 Bland Ch. 284, 22 Am. Dec. 236; First Parish etc. v. Jones, 8 Cush. 189; and see Tripp v. Hasceig, 20 Mich. 254, 4 Am. Rep. 388.

7 2 Greenleaf's Cruise on Real Property, 644; and see chapter I, ante.

## § 308. Title Deeds.

English conveyances usually contain a clause granting all deeds and other muniments of title



relating to the premises conveyed, where the estate granted is a fee.<sup>1</sup> But such a clause is not absolutely necessary, because, in general, deeds follow the land, and a purchaser in fee without warranty, is entitled to them, though not particularly granted.<sup>2</sup> And in this country such a clause is uncalled for, since the universal practice of registration furnishes everything that is requisite in the history of the title.<sup>3</sup>

1 2 Greenleaf's Cruise on Real Property, 648; and see *Lord v. Wardle*, 3 Bing. N. R. 680.

2 2 Greenleaf's Cruise on Real Property, 648; and see *Harrington v. Price*, 3 Barn. & Adol. 170; *Papillon v. Voice*, 2 P. Wms. 471; *Redwine v. Brown*, 10 Ga. 311; *Goode v. Burton*, 11 Jur. 851; *Mills v. Mead*, 7 Hun, 36.

3 See *Woodman v. Coolbroth*, 7 Me. 181; *Kelsey v. Haumer*, 18 Conn. 311; *Scanlan v. Wright*, 13 Pick. 523, 25 Am. Dec. 344. Where an executor is authorized to sell the real estate, and an inspection of the title deeds is necessary to a proper discharge of his duties, he is entitled to their control and possession: *Mills v. Mead*, 7 Hun, 38; and see *Cobbett v. Clutton*, 2 Car. & P. 471.

### § 309. Covenants in Deeds.

Covenants in deeds are those clauses of agreement therein whereby either party stipulates for the truth of certain facts, or binds himself to perform, or forbear doing, something to the other.<sup>1</sup> They are either express, that is, created by the express words of the parties to the deed;<sup>2</sup> or are implied, that is, created by implication of law.<sup>3</sup> Any form of words sufficiently showing the in-

tention of the parties will make an express covenant;<sup>4</sup> and it is not even essential that the word "covenant" itself should be used for this purpose.<sup>5</sup> And a covenant expressed by way of recital may be as obligatory as if expressed in the formal part of the deed.<sup>6</sup> Among the words and forms of expression, from the use of which covenants may be implied, are the following: "give,"<sup>7</sup> "grant,"<sup>8</sup> "demise,"<sup>9</sup> "lease,"<sup>10</sup> "yielding and paying,"<sup>11</sup> "grant, bargain, and sell,"<sup>12</sup> and the like.<sup>13</sup> And although a deed contains express covenants, other covenants may still be implied at common law;<sup>14</sup> but an express covenant will qualify the generality of an implied covenant, and restrain it so that it shall not be held broader than the express covenant.<sup>15</sup> A covenant, being part of a deed, is subject to the same rules of construction as the latter, and should be so expounded as to give effect to the actual intent of the parties;<sup>16</sup> so that construction is to be preferred which renders the whole covenant operative;<sup>17</sup> and it is to be most strongly construed against the covenantor, and most favorably to the covenantee.<sup>18</sup> Generally, the interpretation should be in accordance with the reasonable sense of the words employed.<sup>19</sup> It is said that express covenants are to be construed more strictly than implied ones, since the former may be entered into without consideration, under hand and seal.<sup>20</sup> The primary rule for interpretation is to gather the intention

of the parties from their words, by reading, not simply a single clause of the agreement, but the entire context, and, where the meaning is doubtful, by considering such surrounding circumstances as the parties are presumed to have considered when their minds met.<sup>21</sup> Whether words amount to a condition, a limitation, or a covenant may be a matter of construction, depending upon the contract.<sup>22</sup> A covenant that the land conveyed is "free from encumbrances" is limited by a statement in the granting clause of the deed that it is "subject to" an existing mortgage of a specified amount.<sup>23</sup>

1 2 Blackstone's Commentaries, 304; Bacon's Abridgment, tit. Covenants. See, also, *Randel v. Chesapeake etc. Canal Co.*, 1 Harr. (Del.) 233; *De Bolle v. Pennsylvania Ins. Co.*, 4 Whart. 68, 33 Am. Dec. 38; *Greenleaf v. Allen*, 127 Mass. 248.

2 1 Bouvier's Law Dictionary, 403.

3 *Parker v. Smith*, 17 Mass. 413, 9 Am. Dec. 157; *Emerson v. Wiley*, 10 Pick. 310; *Frey v. Johnson*, 22 How. Pr. 323; *Taylor v. Hepper*, 62 N. Y. 649; *Williams v. Burrell*, 1 Com. B. 429.

4 *Jackson v. Stewart*, 20 Johns. 85; *Marshall v. Craig*, 1 Bibb, 379, 4 Am. Dec. 647; *Lovering v. Lovering*, 13 N. H. 513; *Post v. Weil*, 115 N. Y. 361, 12 Am. St. Rep. 809; *Rigby v. Great Western Ry.*, 14 Mees. & W. 811; *Sampson v. Esterby*, 9 Barn. & C. 505.

5 *Randel v. Chesapeake etc. Canal Co.*, 1 Harr. (Del.) 151; *Bull v. Follett*, 5 Cow. 170; *Kendall v. Talbot*, 2 Bibb, 614.

6 *De Forest v. Byrne*, 1 Hilt. 43; *Horry v. Frost*, 10 Rich. Eq. 109. Compare *Anonymous v. May*, 2 Hayw. 127.

7 *Kent v. Welch*, 7 Johns. 258; *Vanderkarr v. Vanderkarr*, 11 Johns. 122. Compare *Dow v. Lewis*, 4 Gray, 468; *Allen v. Sayward*, 5 Me. 227.

8 *Baber v. Harris*, 9 Ad. & E. 532; *Grannis v. Clark*, 8 Cow. 36.

9 *Sumner v. Williams*, 8 Mass. 201; *Williams v. Burrell*, 1 Com. B. 402, 429; *Bruce v. Fulton Nat. Bank*, 79 N. Y. 162, 35 Am. Rep. 505.

10 *Bandy v. Cartwright*, 2 El. & B. 331; 20 Eng. L. & Eq. 88; *Maule v. Ashmead*, 20 Pa. St. 482.

11 *Kimpton v. Walker*, 9 Vt. 191.

12 *Bush v. Cooper*, 26 Miss. 599; and see *Dickson v. Desire*, 23 Mo. 151, 66 Am. Dec. 661; *Gratz v. Ewalt*, 2 Binn. 95. But compare *Frost v. Raymond*, 2 Caines, 188; *Huntley v. Waddell*, 12 Ired. 32.

13 See *Frost v. Raymond*, 2 Caines, 188; *Crouch v. Fowle*, 9 N. H. 222; *Adams v. Gibney*, 6 Bing. 656; *Mack v. Patchin*, 5 N. Y. 167. By statute, in New York, no covenant shall be implied in any conveyance of real estate: See *Kinney v. Watts*, 14 Wend. 38; but covenants are still implied in leases for years: *Lynch v. Onondaga Salt Co.*, 64 Barb. 558; *Mayor etc. v. Mabie*, 13 N. Y. 158, 64 Am. Dec. 538.

14 *Roebuck v. Dupuy*, 2 Ala. 535; *Funk v. Voneida*, 11 Serg. & R. 109, 14 Am. Dec. 617; *Morris v. Harris*, 9 Gill, 27; *Sumner v. Williams*, 8 Mass. 201. But compare *Burr v. Stenton*, 43 N. Y. 462; *Vanderkarr v. Vanderkarr*, 11 Johns. 122; *Merritt v. Closson*, 36 Vt. 172. But a covenant cannot be implied in the absence of language tending to a conclusion that the covenant sought to be set up was intended: *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276; *Booth v. Cleveland Rolling Mill Co.*, 74 N. Y. 15.

15 *Crouch v. Fowle*, 9 N. H. 219, 32 Am. Dec. 350; *Lynch v. Onondaga Salt Co.*, 64 Barb. 558; *Line v. Stephenson*, 5 Bing. N. C. 183.

16 *Watchman v. Crook*, 5 Gill & J. 239; *Wadlington v. Hill*, 18 Miss. 560; *Marvin v. Stone*, 2 Cow. 781; *Schoenberger v. Hoy*, 40 Pa. St. 132; *Ludlow v. M'Crea*, 1 Wend. 228.

17 *Randel v. Chesapeake etc. Canal Co.*, 1 Harr. (Del.) 154.

18 *Hookes v. Swain*, Lev. 102; Sid. 151; *Randel v. Chesapeake etc. Canal Co.*, 1 Harr. (Del.) 154; *Gifford*

v. First Presby. Soc., 56 Barb. 114; Warde v. Warde, 16 Beav. 103.

19 Pavey v. Burch, 3 Mo. 447, 26 Am. Dec. 682; Kilian v. Harshan, 7 Ired. 497; Clark v. Devoe, 124 N. Y. 120, 21 Am. St. Rep. 652; and see Rogers v. Danforth, 9 N. J. Eq. 289; Toms v. Wilson, 4 Best & S. 422.

20 Shubrick v. Salmond, 3 Burr. 1639. See, as to validity of restraining covenants in deeds: Watrous v. Allen, 57 Mich. 362, 58 Am. Rep. 363; Jenks v. Pawlowski, 98 Mich. 110, 39 Am. St. Rep. 522, and note; West Virginia Transportation Co. v. Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527; sec. 303b, ante.

21 Clark v. Devoe, 124 N. Y. 120, 21 Am. St. Rep. 652; Western N. Y. Ins. Co. v. Clinton, 66 N. Y. 326.

22 Post v. Weil, 115 N. Y. 361, 12 Am. St. Rep. 809.

23 Johnson v. Nichols, 105 Iowa, 122.

### § 310. Covenant of Seisin.

Covenants for title inserted in modern deeds conveying lands take the place of the ancient feudal warranty;<sup>1</sup> and their purpose is to secure to the grantee the benefit of the title which the grantor professes to convey.<sup>2</sup> What are usually termed "full covenants" in the United States are those for seisin, for right to convey, against encumbrances, for quiet enjoyment, for further assurance, and of warranty.<sup>3</sup> The first, or covenant for seisin, is that whereby the grantor covenants with the grantee that he, the grantor, has the very estate, both in quantity and quality, which he professes to convey.<sup>4</sup> If, therefore, the grantor undertakes to convey land by deed, and enters into a covenant of seisin therein, and he has no possession of the land, either by himself or by another, the covenant is at once broken.<sup>5</sup> And,

according to the English and many of the American decisions, a covenant of "seisin," or "lawful seisin," is a covenant that the grantor is seised of an indefeasible estate;<sup>6</sup> but the courts of some of the states hold that this covenant is satisfied if the grantor has an actual seisin, claiming a fee, although his title was acquired tortiously, and is defeasible.<sup>7</sup> And the covenant of seisin extends only to a title existing in a third person, and which might defeat the estate granted;<sup>8</sup> and therefore a person will not be permitted to accept a deed with covenants of seisin and then allege that his covenant is broken, for that, at the time he accepted the deed, he himself was seised of the premises.<sup>9</sup>

1 See 2 Greenleaf's Cruise on Real Property, 761; Middlemore v. Goodale, Cro. Car. 503.

2 2 Greenleaf's Cruise on Real Property, 761; 1 Bouvier's Law Dictionary, 403; Fitzhugh v. Croghan, 2 J. J. Marsh. 429, 19 Am. Dec. 139.

3 4 Kent's Commentaries, 471; Rawle on Covenants for Title, 27; Kingdom v. Nottle, 1 Maule & S. 355.

4 Howell v. Richards, 11 East. 641; Greenby v. Wilcocks, 2 Johns. 1, 3 Am. Dec. 379; Pecare v. Chouteau, 15 Mo. 527. Covenant to stand seised has not been abolished by the Revised Statutes in New York: Eysaman v. Eysaman, 24 Hun, 430. Characteristics of covenant to stand seised: See Watson v. Watson, 24 S. C. 228, 58 Am. Rep. 247.

5 Coit v. McReynolds, 2 Rob. (N. Y.) 655; Fitzhugh v. Croghan, 2 J. J. Marsh. 429, 19 Am. Dec. 139; Slater v. Rawson, 1 Met. 450; Salmon v. Vallejo, 41 Cal. 481; Allen v. Little, 36 Me. 170; Dickinson v. Hoopes, 8 Gratt. 397; Dale v. Shiveley, 8 Kan. 276.

6 Young v. Raincock, 7 Com. B. 310; Lockwood v.

Sturdevant, 6 Conn. 385; Mills v. Catlin, 22 Vt. 106; Parker v. Brown, 15 N. H. 186.

7 Raymond v. Raymond, 10 Cush. 134; Watts v. Parker, 27 Ill. 229; Wilson v. Widenham, 51 Me. 567; Follett v. Grant, 5 Allen, 175.

8 Fitch v. Baldwin, 17 Johns. 161; Furness v. Williams, 11 Ill. 229; Coit v. McReynolds, 2 Rob. (N. Y.) 655.

9 Fitch v. Baldwin, 17 Johns. 161.

### § 311. Breach of Covenant of Seisin.

As to what constitutes a breach of the covenant of seisin, it has been held sufficient if there be an outstanding estate for life;<sup>1</sup> or if there be an adverse possession of a part by a stranger;<sup>2</sup> or a concurrent seisin of another as tenant in common;<sup>3</sup> or if no such land exists as that purported to be conveyed;<sup>4</sup> or even if there be a material deficiency in the amount of land;<sup>5</sup> or if the grantor has only an estate tail.<sup>6</sup> And generally, if the grantor at the time of the conveyance do not own such things affixed to the freehold as would pass to the grantee by a conveyance of the land itself, as fences,<sup>7</sup> or a building,<sup>8</sup> the covenant of seisin is broken.<sup>9</sup> And where the grantor conveyed premises a portion of which he had previously conveyed and given possession of to another, the covenant of seisin, so far as it related to the portion previously conveyed, was held to be broken at the date of the deed.<sup>10</sup> But this covenant is not broken by the existence upon the land of easements or encumbrances not in any way affecting the technical seisin of the pur-

chaser;<sup>11</sup> thus, it is not such a breach that a part of the land conveyed was occupied by a railroad,<sup>12</sup> or a public highway,<sup>13</sup> or that the land was encumbered by an outstanding mortgage,<sup>14</sup> or a judgment,<sup>15</sup> or a right of dower.<sup>16</sup> But it is held that a judgment for taxes, sale, and tax deed constitute a breach of this covenant.<sup>17</sup> It is generally held by the American decisions that there is a breach of the covenant for seisin, if at all, as soon as the deed is executed;<sup>18</sup> and that the right of action for damages arising from the breach cannot pass to a subsequent assignee.<sup>19</sup> But according to other decisions, if there is an actual seisin, the breach is not final and total in the first instance, but is postponed until the grantee, or those claiming under him, are disturbed in their seisin, either actually or constructively;<sup>20</sup> and that the claim for damages will pass by a conveyance to a subsequent grantee.<sup>21</sup> Covenant of seisin is held to be broken as soon as made, where the vendor, at the time of the conveyance, had no other title to the land than that acquired by him through the deed of an infant, made for a merely nominal consideration.<sup>22</sup>

1 *Wilder v. Ireland*, 8 Jones, 90; *Mills v. Catlin*, 22 Vt. 106. Compare *Van Wagner v. Van Nostrand*, 19 Iowa, 422. As to the burden of proof of a breach of this covenant: See *Woolley v. Newcomb*, 87 N. Y. 605.

2 *Sedgwick v. Hollenback*, 7 Johns. 376.

3 *Downer v. Smith*, 38 Vt. 464; *Wheeler v. Hatch*, 12 Me. 389.



4 Bacon v. Lincoln, 4 Cush. 212; Basford v. Pearson, 9 Allen, 389. Compare Morrison v. McArthur, 43 Me. 567.

5 Pringle v. Witten, 1 Bay, 256; Moore v. Johnston, 87 Ala. 222, citing the text. Compare Phipps v. Tarpley, 24 Miss. 597; Kincaid v. Brittain, 5 Sneed, 123.

6 Comstock v. Comstock, 23 Conn. 352.

7 Mott v. Palmer, 1 N. Y. 572.

8 West v. Stewart, 7 Pa. St. 122.

9 See West v. Stewart, 7 Pa. St. 122; Burke v. Nichols, 1 Abb. Ct. App. 260; Tift v. Horton, 53 N. Y. 381; Ritchmyer v. Morse, 3 Keyes, 349; 37 How. Pr. 388; Loughran v. Ross, 45 N. Y. 792, 6 Am. Rep. 173.

10 Lamb v. Danforth, 59 Me. 322, 8 Am. Rep. 426; and compare Hall v. Gale, 20 Wis. 293; Clark v. Conrae, 38 Vt. 469; Traster v. Snelson, 29 Ind. 96.

11 See Reasoner v. Edmundson, 5 Ind. 394; Vaughn, v. Stuzaker, 16 Ind. 340; Stockwell v. Couillard, 129 Mass. 31; Lewis v. Jones, 1 Pa. St. 336; Moore v. Johnston, 87 Ala. 222, citing the text.

12 Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426.

13 Whitbeck v. Cooke, 15 Johns. 483, 8 Am. Dec. 272; Vaughn v. Stuzaker, 16 Ind. 340. But see Trice v. Kayton, 84 Va. 217, 10 Am. St. Rep. 836.

14 Sedgwick v. Hollenback, 7 Johns. 380.

15 Sedgwick v. Hollenback, 7 Johns. 380.

16 Fitzhugh v. Croghan, 2 J. J. Marsh. 429, 19 Am. Dec. 139; Tuite v. Miller, 10 Ohio, 383; Lewis v. Lewis, 5 Rich. 12.

17 Vorhis v. Forsythe, 4 Biss. 409.

18 Salmon v. Vallejo, 41 Cal. 481; Wilson v. Cochran, 46 Pa. St. 229; Fowler v. Poling, 2 Barb. 300; Pollard v. Dwight, 4 Cranch, 430; Lot v. Thomas, 2 N. J. L. 407, 2 Am. Dec. 354; Richard v. Bent, 59 Ill. 38, 14 Am. Rep. 1; Clement v. Bank, 61 Vt. 298; Bowne v. Wolcott, 1 N. Dak. 497; sec. 310, ante.

19 Redwine v. Brown, 10 Ga. 314; Marston v. Hobbs, 2 Mass. 439; Greenby v. Wilcocks, 2 Johns. 1, 3 Am. Dec. 379; Wead v. Larkin, 54 Ill. 489, 5 Am. Rep. 149. Compare Slater v. Rawson, 1 Met. 450; 6 Met. 439.

20 Devore v. Sunderland, 17 Ohio, 60; Great Western Stock Co. v. Saas, 24 Ohio St. 542.

21 Devore v. Sunderland, 17 Ohio, 60; and see Richard v. Bent, 59 Ill. 38, 14 Am. Rep. 1; Schofield v. Iowa Homestead Co., 32 Iowa, 317, 7 Am. Rep. 197; Beddoe v. Wadsworth, 21 Wend. 120; Coleman v. Lyman, 42 Ind. 289.

22 Robinson v. Coulter, 90 Tenn. 705, 25 Am. St. Rep. 708; and see Moore v. Johnston, 87 Ala. 220; Jackson v. Green, 112 Ind. 341; Mygatt v. Coe, 124 N. Y. 212, holding that the covenant is broken as soon as made, if the covenantor has no title.

### § 312. Covenant for Right to Convey.

Covenant for right to convey and covenant for seisin are sometimes said to be synonymous, and that they amount to the same thing.<sup>1</sup> The same fact, the seisin of the grantor, which will support the latter will also support the other covenant.<sup>2</sup> And covenant for right to convey, like covenant for seisin, is broken at the time of conveyance, if at all, and therefore cannot be taken advantage of by an heir or an assignee.<sup>3</sup> But with respect to this covenant for right to convey, it should be observed that although if a man be seised in fee he has power to convey, yet the converse will not hold, since he may have the power to convey, though not seised in fee.<sup>4</sup>

1 Marston v. Hobbs, 2 Mass. 437, 3 Am. Dec. 61; Brandt v. Foster, 5 Iowa, 294; Rickert v. Snyder, 9 Wend. 421; Raymond v. Raymond, 10 Cush. 140. But see Richardson v. Dorr, 5 Vt. 21.

2 Marston v. Hobbs, 2 Mass. 437, 3 Am. Dec. 61.

3 Chapman v. Holmes, 10 N. J. L. 20; Hamilton v. Wilson, 4 Johns. 72, 4 Am. Dec. 253; Swasey v. Brooks, 30 Vt. 692.

4 2 Greenleaf's Cruise on Real Property, 761; Gainsford v. Griffith, 16 Vin. Abr. 206; Devore v. Sunderland, 17 Ohio, 52.

### § 313. Covenants Against Encumbrances.

Covenants against encumbrances are also in praesenti, and are broken, if at all, as soon as made, and are thereby turned into mere rights of action not assignable at law.<sup>1</sup> In general terms, "every right to and interest in the land granted, to the diminution of the value of the land, but consistent with the passing of the fee by the conveyance, is to be deemed in law an encumbrance."<sup>2</sup> Thus, a right to an easement or servitude of any kind in the land, as an existing right in a third person to cut and maintain a drain,<sup>3</sup> or other artificial watercourse,<sup>4</sup> or to cut and remove standing trees,<sup>5</sup> is an encumbrance, and a breach of the covenant against encumbrances.<sup>6</sup> So of a right to pass over the land and take water from a spring;<sup>7</sup> or to erect dams at different places on a stream.<sup>8</sup> And a grant to a railroad company of a right of way is an easement, the existence of which is a breach of this covenant in a subsequent deed of the same land by the same grantor to a third party.<sup>9</sup> So the existence of a public road or highway over the land is in most of the states held to be a breach of this covenant.<sup>10</sup> An outstanding mortgage,<sup>11</sup> unless the premises are declared to be subject thereto,<sup>12</sup> a judgment,<sup>13</sup> an attachment,<sup>14</sup> a claim of dower,<sup>15</sup> taxes,<sup>16</sup> and a para-

mount title,<sup>17</sup> are all held to be encumbrances within the meaning of a covenant against encumbrances.<sup>18</sup> Nor are the rights of the parties claiming under the covenant affected by the fact that the covenantee knew of the existence of the encumbrance at the time of the conveyance.<sup>19</sup> It is held to be a breach of the covenant where premises are sold subject to a covenant that no ardent spirits shall be sold thereon,<sup>20</sup> or that a division fence shall be maintained,<sup>21</sup> or subject to a restriction against building, except in a specified way.<sup>22</sup> It has also been held that the covenant is broken by the existence of a prior outstanding lease.<sup>23</sup> But the right which a mill owner has to go upon the land and clear the channel of a stream is not an encumbrance.<sup>24</sup> And no tax or assessment will be deemed an encumbrance upon land until the amount of such tax is ascertained or determined.<sup>25</sup> And an outstanding mortgage, which the covenantee is bound to pay, is not an encumbrance.<sup>26</sup>

1 Clark v. Swift, 3 Met. 390; Funk v. Voneida, 11 Serg. & R. 110, 14 Am. Dec. 617; Richard v. Bent, 59 Ill. 38, 14 Am. Rep. 1; Logan v. Moulder, 1 Ark. 313, 33 Am. Dec. 338; Huyck v. Andrews, 113 N. Y. 81, 10 Am. St. Rep. 432; Copeland v. McAdory, 100 Ala. 553; and see sec. 304, ante. But compare Foote v. Burnet, 10 Ohio, 333.

2 Prescott v. Trueman, 4 Mass. 630, 3 Am. Dec. 246; and see Bronson v. Coffin, 108 Mass. 175; Mitchell v. Warner, 5 Conn. 527; Cary v. Daniels, 8 Met. 482; Huyck v. Andrews, 113 N. Y. 81, 10 Am. St. Rep. 432;

Burr v. Lamaster, 30 Neb. 688, 27 Am. St. Rep. 428.

3 Smith v. Sprague, 40 Vt. 43.

4 Prescott v. White, 21 Pick. 341.

5 Cathcart v. Bowman, 5 Pa. St. 319; Spurr v. Andrew, 6 Allen, 420.

6 See Kutz v. McCune, 22 Wis. 628; Brooks v. Curtis, 4 Lans. 283; 50 N. Y. 639, 10 Am. Rep. 545; McMullin v. Wooley, 2 Lans. 394; Giles v. Dugro, 1 Duer, 331; Lamb v. Danforth, 59 Me. 322, 8 Am. Rep. 426.

7 Harlow v. Thomas, 15 Pick. 68. Compare Russ v. Steele, 40 Vt. 310.

8 Ginn v. Hancock, 31 Me. 42. Compare Wetherbee v. Bennett, 2 Allen, 428.

9 Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731; Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426; Beach v. Miller, 51 Ill. 206, 2 Am. Rep. 290.

10 Pritchard v. Atkinson, 3 N. H. 335; Kellogg v. Ingersoll, 2 Mass. 101; Parish v. Whitney, 3 Gray, 516; Haynes v. Young, 36 Me. 557; Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 731; Whitbeck v. Cook, 15 Johns. 483, 8 Am. Dec. 272; Huyck v. Andrews, 113 N. Y. 81, 10 Am. St. Rep. 432; Copeland v. McAdory, 100 Ala. 553. It is otherwise, however, in Pennsylvania: Wilson v. Cochran, 46 Pa. St. 229. In Georgia, if the highway is known to the purchaser to exist at the time of the purchase, the covenant is not broken: Desvergers v. Willis, 56 Ga. 515, 21 Am. Rep. 289.

11 Freeman v. Foster, 55 Me. 508; Brooks v. Moody, 25 Ark. 452; Prescott v. Trueman, 4 Mass. 630.

12 Freeman v. Foster, 55 Me. 508.

13 Jenkins v. Hopkins, 8 Pick. 346; Holman v. Creagmiles, 14 Ind. 177.

14 Kelsey v. Renor, 43 Conn. 129, 21 Am. Rep. 638.

15 Porter v. Noyes, 2 Me. 22, 11 Am. Dec. 30; Runnels v. Webber, 59 Me. 488; Bigelow v. Hubbard, 97 Mass. 195; Heimbarg v. Ismay, 3 Jones & S. 35; McAlpin v. Woodruff, 11 Ohio St. 120. But see Powell v. Monson etc. Co., 3 Mason, 355; Bostwick v. Williams, 36 Ill. 65.

16 Mitchell v. Pillsbury, 5 Wis. 407; Peters v. Myers, 22 Wis. 602; Almy v. Hunt, 48 Ill. 45; Rundell v. Lakey,

40 N. Y. 514; *Harper v. Dowdney*, 113 N. Y. 644; *Ingalls v. Cooke*, 21 Iowa, 560; *Long v. Moler*, 5 Ohio St. 271.

17 *Prescott v. Trueman*, 4 Mass. 630, 3 Am. Dec. 246; *Cornell v. Jackson*, 3 Cush. 309.

18 See *Cary v. Daniels*, 8 Met. 482; *Bean v. Mayo*, 5 Me. 94; *Carter v. Denman*, 23 N. J. L. 273; *Hutchins v. Moody*, 34 Vt. 433; *McMullin v. Wooley*, 2 Lans. 394.

19 *Huyck v. Andrews*, 113 N. Y. 81, 10 Am. St. Rep. 432; *Copeland v. McAdory*, 100 Ala. 553; *Burr v. Lamaster*, 30 Neb. 688, 27 Am. St. Rep. 428; *Snyder v. Lane*, 10 Ind. 424; *Beach v. Miller*, 51 Ill. 206, 2 Am. Rep. 290; *Funk v. Voneida*, 11 Serg. & R. 110, 14 Am. Dec. 617; *Hovey v. Newton*, 7 Pick. 29. But compare *Desvergers v. Willis*, 56 Ga. 515, 2 Am. Rep. 289; *Kutz v. McCune*, 22 Wis. 628, 99 Am. Dec. 85; *Memmert v. McKeen*, 112 Pa. St. 315.

20 *Hatcher v. Andrews*, 5 Bush, 561.

21 *Burbank v. Pillsbury*, 48 N. H. 475; and see *Anonymous*, 2 Abb. N. C. 56.

22 *Roberts v. Levy*, 3 Abb. Pr., N. S., 311. Compare *Floyd v. Clark*, 7 Abb. N. C. 136; *Walter v. Walter*, 3 Abb. N. C. 12.

23 *Batchelder v. Sturgis*, 3 Cush. 201; *Porter v. Bradley*, 7 R. I. 538. Compare *Gale v. Edwards*, 52 Me. 360; *Pease v. Christ*, 31 N. Y. 141; *Cross v. Noble*, 67 Pa. St. 77; *James v. Lichfield*, L. R. 9 Eq. 51.

24 *Prescott v. Williams*, 5 Met. 429.

25 *Dowdney v. Mayor etc.*, 54 N. Y. 186; and see *Barlow v. St. Nicholas Bank*, 63 N. Y. 399; *Pierce v. Brew*, 43 Vt. 292.

26 *Watts v. Wellman*, 2 N. H. 458.

### § 313a. Same—Continued.

An assessment by a drainage commissioner is an encumbrance.<sup>1</sup> So of a right to procure ice from premises.<sup>2</sup> So a covenant by the owner of a lot to pay a portion of the cost of a party-wall erected thereon, in the event that it is used by him, is a

covenant and encumbrance which runs with the land, and is binding upon his grantee.<sup>3</sup> A covenant of warranty can never be treated as a covenant against encumbrances, since it would be broken as soon as made, if the encumbrance existed prior to the delivery of the deed.<sup>4</sup>

1 *Lindsay v. Eastwood*, 72 Mich. 336.

2 *Smith v. Davis*, 44 Kan. 362.

3 *Burr v. Lamaster*, 30 Neb. 688, 27 Am. St. Rep. 428; and see, to same effect, *Gibson v. Holden*, 115 Ill. 199, 56 Am. Rep. 146; *Sharp v. Cheatham*, 88 Mo. 498, 57 Am. Rep. 433; *Richardson v. Tobey*, 121 Mass. 457, 23 Am. Rep. 283.

4 *Marbury v. Thornton*, 82 Va. 702.

### § 314. Covenant for Quiet Enjoyment.

Covenant for quiet enjoyment is that whereby the grantor covenants that the grantee shall hold and enjoy the premises granted, without disturbance of the grantor or others.<sup>1</sup> This covenant extends to the possession merely, and not to the title of the land;<sup>2</sup> and in order to establish a breach of the covenant, a lawful eviction in some form, either actual or constructive, must be shown.<sup>3</sup> According to the later decisions, the covenant is broken whenever there has been an involuntary loss of possession by reason of the hostile assertion of an irresistible paramount title, whether that title be established by judgment or not.<sup>4</sup> If the land conveyed is in the possession of a stranger under paramount title who keeps out the grantee, the covenant is broken.<sup>5</sup> But the

grantee is bound to act in good faith toward his grantor, and make the most of whatever title he has acquired;<sup>6</sup> and if he yields without a contest or resistance, the burden rests upon him to show that the title was paramount, and that he yielded the possession to the pressure of that title.<sup>7</sup> A disturbance of the title and possession of the land, by reason of a suit in equity, is a breach of the covenant for quiet enjoyment against disturbances generally;<sup>8</sup> though it is otherwise if such disturbance extends only to a particular mode of enjoyment of the land, and not to the title or possession.<sup>9</sup> The covenant will not be held to extend to wrongful and unlawful evictions by third persons;<sup>10</sup> nor to evictions under rights acquired subsequently to the conveyance.<sup>11</sup> But an entry by the grantor himself, tortiously and without title, is a breach of the covenant.<sup>12</sup> And a covenant against the acts of a particular person named embraces tortious acts.<sup>13</sup> A covenant against disturbances, "by any persons whomsoever," does not, however, extend to the acts of a state,<sup>14</sup> or of the federal government.<sup>15</sup> In American conveyances the covenant of warranty frequently takes the place of that for quiet enjoyment;<sup>16</sup> but in England the latter is now called the "sweeping covenant," having practically superseded the feudal warranty as a guaranty of title.<sup>17</sup>

1 See *Howell v. Richards*, 11 East, 641; *Fowler v. Poling*, 6 Barb. 170; *Connor v. Bernheimer*, 6 Daly, Boone Real Prop.—69



295; *Rea v. Minkler*, 5 Lans. 199; *Norman v. Foster*, 1 Mod. 101.

2 *Whitbeck v. Cook*, 15 Johns. 483, 8 Am. Dec. 272; *Fowler v. Poling*, 6 Barb. 170.

3 *Rea v. Minkler*, 5 Lans. 199; *Russ v. Steele*, 40 Vt. 315; *Moore v. Frankenfield*, 25 Minn. 540; *Whitbeck v. Cook*, 15 Johns. 483, 8 Am. Dec. 272; *Green-vault v. Davis*, 4 Hill, 645; *Murphy v. Price*, 48 Mo. 250; and see *Ross v. Dysart*, 33 Pa. St. 452; *Mayor etc. v. Whitt*, 15 Mees. & W. 577.

4 *Clark v. Lineberger*, 44 Ind. 223; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Stewart v. Drake*, 9 N. J. L. 141; *Cowdrey v. Coit*, 44 N. Y. 382, 4 Am. Rep. 690; *Smith v. Shepard*, 15 Pick. 147; *Home Life Ins. Co. v. Sherman*, 46 N. Y. 370; *Shattuck v. Lamb*, 65 N. Y. 499, 22 Am. Rep. 656; *Copeland v. McAdory*, 100 Ala. 559; *Dillahunt v. Railway Co.*, 59 Ark. 633; *Green v. Irving*, 54 Miss. 464, 28 Am. Rep. 371; *Clafin v. Case*, 53 Kan. 562; *Ogden v. Ball*, 40 Minn. 97; *Elling v. Harrington*, 17 Mont. 324; *Burr v. Greeley*, 52 Fed. Rep. 929; *Scriver v. Smith*, 100 N. Y. 471, 53 Am. Rep. 224; and see *Upton v. Townsend*, 17 Com. B. 30; *Adams v. Conover*, 22 Hun, 424.

5 *Shattuck v. Lamb*, 65 N. Y. 499, 22 Am. Rep. 656; and see *Playter v. Cunningham*, 21 Cal. 229; *Witty v. Hightower*, 12 Smedes & M. 478; *Noonan v. Lee*, 2 Black, 507.

6 *Moore v. Vail*, 17 Ill. 190.

7 *Moore v. Vail*, 17 Ill. 190; *Thomas v. Stickle*, 32 Iowa, 76; *Peck v. Hensley*, 20 Tex. 678; *Stone v. Hooker*, 9 Cow. 157.

8 *Martin v. Martin*, 1 Dev. 413; *Calthorp v. Heyton*, 2 Mod. 54; *Rawle on Covenants for Title*, 4th ed., 143; and see *Mason v. Kellogg*, 38 Mich. 143; *McAlester v. Landers*, 70 Cal. 82.

9 *Dennett v. Atherton*, L. R. 7 Q. B. 326.

10 2 *Greenleaf's Cruise on Real Property*, 764; *Rantin v. Robertson*, 2 Strob. 366; *Ellis v. Welch*, 6 Mass. 250; *Jones v. Worley*, 21 La. Ann. 404; *Dudley v. Folliott*, 2 Term Rep. 584.

11 *Ellis v. Welch*, 6 Mass. 250; *Frost v. Ernst*, 4 Whart. 85.

12 *Sedgwick v. Hollenback*, 7 Johns. 376. But an entry by the lessor upon the demised premises merely to make repairs is not a breach of the covenant: *Doupe v. Genin*, 37 How. Pr. 5; 1 Sweeny, 25; and see *Bostwick v. Williams*, 36 Ill. 69; *Mayor etc. v. Mabie*, 13 N. Y. 156, 64 Am. Dec. 538.

13 *Foster v. Mapes*, Cro. Eliz. 212; *Nash v. Palmer*, 5 Maule & S. 374; *Pence v. Duval*, 9 B. Mon. 49.

14 *Frost v. Ernst*, 4 Whart. 86; *Ellis v. Welch*, 6 Mass. 246, 4 Am. Dec. 122.

15 *Osborn v. Nicholson*, 13 Wall. 655. Compare *Walker v. Gatlin*, 12 Fla. 9; *Whitworth v. Carter*, 43 Miss. 61; *Porter v. Ralston*, 6 Bush, 665; *Fitzpatrick v. Hearne*, 44 Ala. 171, 4 Am. Rep. 128.

16 See *Sisson v. Seabury*, 1 Sum. 263; *Kelley v. Dutch Church*, 2 Hill, 105; *Rea v. Minkler*, 5 Lans. 199.

17 See *Rawle on Covenants for Title*, 4th ed., 125.

### § 315. Covenant for Further Assurance.

Covenant for further assurance is one by which the grantor binds himself to make all such further assurances of the lands as the grantee or his counsel shall lawfully and reasonably require.<sup>1</sup> This covenant is of extensive use in English conveyances, but is rarely inserted in American deeds.<sup>2</sup> In the execution of the covenant, the grantor is not required to do unnecessary acts;<sup>3</sup> nor such as are impracticable.<sup>4</sup> But it includes the levying of a fine,<sup>5</sup> and the removal of a judgment or other encumbrance.<sup>6</sup> A covenant to the effect that if the grantors "obtain the fee simple" to property conveyed "from the government of the United States they will convey the same" to the grantee, his heirs, or assigns, "by deed of general war-

ranty,"<sup>7</sup> is a covenant for further assurance, and entitles such grantee, etc., when the contingency happens, to the conveyance of the legal title.<sup>8</sup> The covenant only takes effect in case the grantors acquire the title directly from the United States, and does not cover the acquisition of the title of the United States from any intermediate party.<sup>9</sup> The request for a further assurance must be made within a reasonable time.<sup>10</sup>

1 2 Greenleaf's Cruise on Real Property, 767; Rosewell's Case, 5 Rep. 19b; and see King v. Jones, 5 Taunt. 418; Miller v. Parsons, 9 Johns. 336; Fields v. Squires, Deady, 388; Armstrong v. Darby, 26 Mo. 517.

2 See Nelson v. Harwood, 3 Call, 394; Gwynn v. Thomas, 2 Gill & J. 420; Colby v. Osgood, 29 Barb. 339.

3 Warn v. Bickford, 7 Price, 550; 9 Price, 43.

4 Pet's Case, 1 Leon, 304.

5 King v. Jones, 5 Taunt. 418; Innes v. Jackson, 16 Ves. 366.

6 King v. Jones, 5 Taunt. 418; and see Colby v. Osgood, 29 Barb. 339.

7 See Davenport v. Lamb, 13 Wall. 418.

8 Lamb v. Burbank, 1 Saw. 227. Compare Dusseume v. Burnett, 5 Iowa, 45; Davis v. Tarwater, 15 Ark. 286.

9 Davenport v. Lamb, 13 Wall. 418.

10 Nash v. Ashton, T. Jones, 195; and see Heron v. Treyne, 2 Ld. Raym. 750; Miller v. Parsons, 9 Johns. 336.

## § 316. Covenant of Warranty.

The covenant of warranty in a deed conveying land, or any interest therein, is an undertaking by the warrantor, that on the failure of the title which the deed purports to convey, either for the

whole estate or for a part only, he will make compensation in money for the loss sustained by such failure of title.<sup>1</sup> This covenant goes to the title as well as the possession,<sup>2</sup> and therefore differs from the covenant for quiet enjoyment, which extends only to the possession.<sup>3</sup> So as it respects the latter, the eviction is merely required to be of lawful right;<sup>4</sup> but in respect to the former, the eviction must not only be of lawful right, but by paramount title.<sup>5</sup> In legal effect, the two covenants are considered by many authorities to be the same.<sup>6</sup> Warranty is a personal covenant,<sup>7</sup> running with the land,<sup>8</sup> and is the most effective covenant in American deeds.<sup>9</sup> In English deeds its place is supplied by the covenant for quiet enjoyment.<sup>10</sup> In order to sustain an action on a covenant of warranty, an eviction by judgment at law is not necessary.<sup>11</sup> The tenant may voluntarily yield to a dispossession, without losing his remedy on the covenant, provided the title to which he yielded be good and paramount to that of his warrantor.<sup>12</sup> But he does so at his own peril, and in a suit against his warrantor the burden of proof rests upon the plaintiff.<sup>13</sup> An eviction by legal process under a prior mortgage,<sup>14</sup> or under an unexpired term for years, is a sufficient breach of this covenant;<sup>15</sup> and a judgment in ejectment is a sufficient breach without actual eviction.<sup>16</sup> A general covenant of warranty is held to be broken by the existence of an outstand-

ing right of way over the whole or a part of the premises conveyed.<sup>17</sup> But the opening of a highway over the land in virtue of the right of eminent domain is not an eviction.<sup>18</sup> And a general covenant of warranty is not broken by the existence of encumbrances known to the grantee at the time of sale, and which he agreed to pay off as a part of the consideration.<sup>19</sup> An illegal or tortious eviction is not a breach of a general covenant of warranty against the claims or acts of all persons;<sup>20</sup> but a particular or special covenant against the claims or acts of certain persons therein named is broken by such an eviction, if by the persons or under the claims specified.<sup>21</sup> Where one without title conveys with warranty, and afterward acquires the title, it inures to the benefit of his grantee.<sup>22</sup> A conveyance with general warranty estops the grantor from setting up any after-acquired title.<sup>23</sup>

1 King v. Kerr, 5 Ohio, 154, 22 Am. Rep. 777. See Mitchel v. Warner, 5 Conn. 517.

2 Williams v. Wetherbee, 1 Aiken, 233; Patton v. Kennedy, 1 A. K. Marsh. 389, 10 Am. Dec. 741; Fowler v. Poling, 6 Barb. 170. See Blanchard v. Brooks, 12 Pick. 67; Rowe v. Heath, 23 Tex. 614; Brown v. Jackson, 3 Wheat. 449.

3 See sec. 314, ante.

4 See sec. 314, ante.

5 Rindskopf v. Farmers' etc. Co., 58 Barb. 36; King v. Kerr, 5 Ohio, 154, 22 Am. Rep. 777; Fowler v. Poling, 6 Barb. 165; Kellogg v. Platt, 33 N. J. L. 328; Kenney v. Norton, 10 Heisk. 384; and see Mills v. Rice, 3 Neb. 76; Bissell v. Kellogg, 60 Barb. 629; Troxell v. Johnson, 52 Neb. 46.

6 See *Rea v. Minkler*, 5 Lans. 199; *Bostwick v. Williams*, 36 Ill. 70; *Caldwell v. Kirkpatrick*, 6 Ala. 60; *Bricker v. Bricker*, 11 Ohio St. 240.

7 *Tabb v. Binford*, 14 Leigh, 132, 26 Am. Dec. 317; *Townsend v. Morris*, 6 Cow. 126; *Cole v. Raymond*, 9 Gray, 217. See *Jones v. Franklin*, 30 Ark. 631.

8 *King v. Kerr*, 5 Ohio, 154, 22 Am. Rep. 777; *Wilson v. Taylor*, 9 Ohio St. 597; *Suydam v. Jones*, 10 Wend. 180, 25 Am. Dec. 552; *Moore v. Merrill*, 17 N. H. 81; *Mead v. Larkin*, 54 Ill. 489, 5 Am. Rep. 149; *De Chaumont v. Forsythe*, 2 Penr. & W. 514; *Rindskopf v. Farmers' etc. Co.*, 58 Barb. 36.

9 See *Foote v. Burnet*, 10 Ohio, 329, note; *Dickinson v. Hoomes*, 8 Gratt. 399; *Leary v. Durham*, 4 Ga. 601; *Jones v. Franklin*, 30 Ark. 631.

10 See sec. 314, ante.

11 *Greenvault v. Davis*, 4 Hill, 643; sec. 307, ante; *Patton v. Kennedy*, 1 A. K. Marsh. 389, 10 Am. Rep. 744. But compare *Stewart v. Drake*, 9 N. J. L. 139; *Stipe v. Stipe*, 2 Head, 169.

12 *Collier v. Cowger*, 52 Ark. 322; *Eversole v. Early*, 80 Iowa, 601; *Lambert v. Estes*, 99 Mo. 604; *Hamilton v. Cutts*, 4 Mass. 352, 3 Am. Dec. 222; and see *Donnell v. Thompson*, 10 Me. 170, 25 Am. Dec. 216; *Peck v. Wensley*, 20 Tex. 673; *Brandt v. Foster*, 5 Iowa, 297; *Booker v. Bell*, 3 Bibb, 173, 6 Am. Dec. 641; *Hodges v. Latham*, 98 N. C. 239, 2 Am. St. Rep. 333.

13 *Hamilton v. Cutts*, 4 Mass. 352, 3 Am. Dec. 222; *Smith v. Shepard*, 15 Pick. 147; *Crance v. Collenbaugh*, 47 Ind. 256. Recent decisions in many of the states sustain the doctrine that an eviction is complete when a constructive dispossession has taken place: See *Kansas etc. R. R. v. Dunmeyer*, 19 Kan. 539; *Whitney v. Dinsman*, 6 Cush. 124; *Jones v. Warner*, 81 Ill. 346; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; sec. 307, ante. But this doctrine is not adopted in Mississippi; *Barris v. Wilkinson*, 31 Miss. 537; *Dyer v. Britton*, 53 Miss. 270; *Green v. Irving*, 54 Miss. 450, 28 Am. Rep. 360; and compare *Fitzhugh v. Croghan*, 2 J. J. Marsh. 429, 19 Am. Dec. 139.

14 *Tufts v. Adams*, 8 Pick. 547. Compare *Cowdrey*

v. Coit, 44 N. Y. 382, 4 Am. Rep. 690; Curtis v. Deering, 12 Me. 499.

15 Rickert v. Snyder, 9 Wend. 416.

16 Drury v. Shumway, 1 D. Chip. 110, 1 Am. Dec. 704; Cummins v. Kennedy, 3 Litt. 118, 14 Am. Dec. 45; Williams v. Wetherbee, 1 Aiken, 233; King v. Kilbride, 58 Conn. 109. But see Ferriss v. Harshea, 1 Mart. & Y. 48, 17 Am. Dec. 782.

17 Russ v. Steele, 40 Vt. 310; and see Butt v. Riffe, 78 Ky. 352. Compare sec. 307, ante.

18 Peck v. Jones, 70 Pa. St. 83; and see Spader v. New York etc. R. R. Co., 3 Abb. N. C. 467; Hymes v. Estey, 116 N. Y. 501, 15 Am. St. Rep. 421. This covenant is not broken by any act of a mere stranger: Norton v. Jackson, 5 Cal. 263; Hale v. New Orleans, 13 La. Ann. 499.

19 Pitman v. Conner, 27 Ind. 337.

20 Patton v. Kennedy, 1 A. K. Marsh. 389, 10 Am. Dec. 744.

21 Patton v. Kennedy, 1 A. K. Marsh. 389, 10 Am. Dec. 744. Compare Comstock v. Smith, 13 Pick. 116; Kimball v. Temple, 25 Cal. 452; Davenport v. Lamb, 13 Wall. 418; Ballard v. Child, 46 Me. 152; sec. 307, ante.

22 Williams v. Gray, 3 Me. 207, 14 Am. Rep. 234; Kimball v. Schoff, 40 N. H. 190; Burton v. Reeds, 20 Ind. 87. Compare Russ v. Alpaugh, 118 Mass. 369, 19 Am. Rep. 464.

23 Comstock v. Smith, 13 Pick. 116, 23 Am. Dec. 670; Crocker v. Pierce, 31 Me. 177; Butler v. Seward, 10 Allen, 468. But compare Doane v. Willcutt, 5 Gray, 333; Miller v. Ewing, 6 Cush. 40. A grantor is not estopped from acquiring title to the premises conveyed by adverse possession, which will not accrue to the benefit of the grantee: Sherman v. Kane, 14 Jones & S. 310.

### § 316a. Same—Continued.

The covenant of warranty is not necessarily an undertaking that there is no encumbrance on the land at the time, but that the purchaser and his

assigns shall at all times enjoy the land free from all encumbrances.<sup>1</sup> This covenant attaches only to the estate granted or purported to be granted, and can neither enlarge the estate nor pass by estoppel a greater estate than that actually conveyed.<sup>2</sup> Nor can such covenant in a vendor's deed be extended to cover future laches of the vendee, by which he loses, by limitation, the title to the land conveyed to him.<sup>3</sup> Any act tantamount to an eviction of the grantee would be a breach of the covenant of warranty, subjecting the grantor to damages, and a judgment in ejectment would clearly be such an act.<sup>4</sup> The covenant is broken upon recovery by a stranger of a permanent use of part of the land as a private passway.<sup>5</sup> But the fact that part of the land was, at the time of conveyance, a highway, and used as such, is not a breach of the covenant.<sup>6</sup>

1 King v. Kilbride, 58 Conn. 109.

2 Adams v. Ross, 30 N. J. L. 505, 82 Am. Dec. 237; Hull v. Hull, 35 W. Va. 155, 29 Am. St. Rep. 800; and see Reynolds v. Shaver, 59 Ark. 299, 43 Am. St. Rep. 36.

3 Harn v. Smith, 79 Tex. 310, 23 Am. St. Rep. 340.

4 King v. Kilbride, 58 Conn. 109; and see cases cited in preceding section.

5 Butt v. Riffe, 78 Ky. 352.

6 Hymes v. Estey, 116 N. Y. 501, 15 Am. St. Rep. 421; Wilson v. Cochran, 46 Pa. St. 229. See sec. 313, ante.



**§ 316b. Covenant Assuming Mortgage.**

Where a conveyance is made subject to a mortgage, which, by the terms of the deed, the grantee "assumes," he thereby becomes liable for the mortgage debt. The covenant to assume is the equivalent of one to pay.<sup>1</sup> The acceptance of such deed by the grantee binds him to payment.<sup>2</sup> He thereby takes upon himself the burden of the debt or claim secured by the mortgage, and, as between him and his grantor, he becomes the principal, and the grantor merely a surety for the payment of the debt.<sup>3</sup> The grantee is held liable to the mortgagee in such case although his grantor was not liable.<sup>4</sup> Nor can he evade the liability by a release from the mortgagor.<sup>5</sup> The grantee who assumes and agrees to pay a mortgage waives all defenses except payment.<sup>6</sup> And it is held that the grantee in a conveyance by deed-poll, containing a mortgage assumption clause, upon acceptance of the deed, becomes bound as covenantor to pay the mortgage.<sup>7</sup> But a personal obligation on the part of a grantee to pay a mortgage upon the premises conveyed may not be implied from a mere statement in his deed that the conveyance is subject to the mortgage.<sup>8</sup> There is a conflict in the decisions as to the ground of the liability of the grantee who assumes the payment of a mortgage upon the property conveyed to him. In many cases it has been held, in substance, that where the purchaser of an equity of redemption

agrees with the mortgagor to pay the whole or a part of the mortgage debt, such a promise may be treated as a contract made by the mortgagor for the mortgagee's benefit, which the latter may adopt as his own, and enforce by a suit at law.<sup>9</sup> On the other hand, the doctrine is maintained that the liability of the grantee who assumes the payment of a mortgage debt upon the property conveyed to him depends upon the equitable doctrine of subrogation, and that the obligation he assumes can be enforced only in an equitable proceeding.<sup>10</sup> The question whether the remedy of the mortgagee against the grantee is at law and in his own right, or in equity and in the right of the mortgagor only, is to be determined by the law of the place where the suit is brought.<sup>11</sup>

1 Schley v. Fryer, 100 N. Y. 71; Stout v. Folger, 34 Iowa, 71, 11 Am. Rep. 138; Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199; Sparkman v. Gove, 44 N. J. L. 252; Tomlinson v. Givens, 144 Mo. 19.

2 Bowen v. Beck, 94 N. Y. 86, 46 Am. Rep. 124.

3 Rice v. Sanders, 152 Mass. 108, 23 Am. St. Rep. 804; George v. Andrews, 60 Md. 26, 45 Am. Rep. 706; Union etc. Ins. Co. v. Hanford, 143 U. S. 187.

4 Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467.

5 Bay v. Williams, 112 Ill. 91, 54 Am. Rep. 209.

6 Cranford v. Edwards, 33 Mich. 354; Terry v. Durand Land Co., 112 Mich. 665.

7 Atlantic Dock Co. v. Leavitt, 54 N. Y. 35, 13 Am. Rep. 556; Bowen v. Beck, 94 N. Y. 86, 46 Am. Rep. 124; Locke v. Homer, 131 Mass. 93, 41 Am. Rep. 199; Starbird v. Cranston, 24 Colo. 25.

8 Patton v. Adkins, 42 Ark. 197; Dean v. Walker, 107 Ill. 540, 47 Am. Rep. 467; Life Assur. Co. v. Bost-

wick, 100 N. Y. 628; Merriman v. Moore, 90 Pa. St. 78; Fiske v. Tolman, 124 Mass. 254, 26 Am. Rep. 659.

9 See Skinner v. Harker, 23 Colo. 333; Starbird v. Cranston, 24 Colo. 20; Bay v. Williams, 112 Ill. 91, 54 Am. Rep. 209; Urquhart v. Brayton, 12 R. I. 169; Merriman v. Moore, 90 Pa. St. 78; Thorp v. Coal Co., 48 N. Y. 253; Ingram v. Ingram, 172 Ill. 287; Follansbe v. Johnson, 28 Minn. 311; Campbell v. Smith, 71 N. Y. 26, 27 Am. Rep. 5; Beeson v. Green, 103 Iowa, 406; Hare v. Murphy, 45 Neb. 809; Stichter v. Cox, 52 Neb. 533; Gibson v. Hambleton, 52 Neb. 601.

10 See, as sustaining this doctrine, Biddel v. Brizzolara, 64 Cal. 354; Boardman v. Larrabee, 51 Conn. 39; Coffin v. Adams, 131 Mass. 133, 137; Palmetter v. Carey, 63 Wis. 426; Knapp v. Connecticut etc. Ins. Co., 85 Fed. Rep. 329; and also approved by the supreme court of the United States: Keller v. Ashford, 133 U. S. 610; Willard v. Wood, 135 U. S. 309.

11 Union etc. Ins. Co. v. Hanford, 143 U. S. 187.

### § 317. Covenants Running with the Land.

A covenant is said to run with the land "when either the liability to perform it or the right to take advantage of it passes to the assignee of that land."<sup>1</sup> They are such as relate to or "touch and concern the land" in such a way that their benefit or burden is capable of running with it;<sup>2</sup> and if the thing to be done is merely collateral to the land, then the assignee is not charged.<sup>3</sup> In England all covenants for title are termed real covenants, and run with the land.<sup>4</sup> But the prevailing doctrine in this country is that covenants of seisin, of good right to convey, and against encumbrances, are covenants in presenti, which, if broken at all, the breach occurs at the instant they are made;<sup>5</sup> these covenants do not therefore run with the land, and the right of action for a

breach does not pass to the assignee of the covenantee.<sup>6</sup> But covenants for quiet enjoyment, for further assurance, and of warranty are prospective in their character,<sup>7</sup> running with the land,<sup>8</sup> and may be enforced not only by the covenantee and his representatives, but by heirs, devisees, and alienees, who claim under the seisin vested in him.<sup>9</sup> So there are other covenants which run with the land, as a covenant by a tenant to repair;<sup>10</sup> a covenant to maintain fences;<sup>11</sup> to pay rent;<sup>12</sup> to reside on the premises;<sup>13</sup> to cultivate the lands demised in a particular manner;<sup>14</sup> not to carry on a particular trade;<sup>15</sup> to allow the lessor free access to certain rooms excepted in the demise;<sup>16</sup> by a lessor for years, to pay the lessee for his improvements at the end of the term;<sup>17</sup> by a grantor, not to erect or suffer to be erected any structure or edifice upon a lot adjoining the premises conveyed;<sup>18</sup> or that neither he nor his heirs shall make any claim to the land conveyed;<sup>19</sup> and by a purchaser of lands, not to exercise or permit to be exercised any offensive trade upon the premises.<sup>20</sup> So a covenant to effect insurance, and apply the proceeds to the repair of the property in case of loss by fire, runs with the land;<sup>21</sup> so of a covenant to save the husband from the wife's claim of dower;<sup>22</sup> or a covenant to pay assessments;<sup>23</sup> and a covenant in a conveyance of city lots, that any house which might be erected thereon should be set back a certain distance from the

line of the street on which such lots fronted, was held to run with the land.<sup>24</sup> Incorporeal hereditaments, as well as those which are corporeal, may be the subject of covenants running with the land.<sup>25</sup> But covenants which are indefinite as to their subject matter do not pass with the land.<sup>26</sup> A conveyance of the privilege of drawing water from a pond is not a conveyance of land, and a covenant connected with the privilege does not run with the land, and is not assignable.<sup>27</sup> A covenant by the owner of land not to permit a gristmill to be erected upon his land does not run with the land;<sup>28</sup> so of a covenant not to hire persons of a certain description to work in a mill;<sup>29</sup> and so of a covenant by the vendor of marl land, that neither he nor his assigns will sell marl from adjoining land.<sup>30</sup> A covenant that the vendee, "his heirs and assigns, owner or owners of the land for the time being," would at any time, on six months' notice, resell to the vendor for a specified price, does not run with the land.<sup>31</sup> And it seems that such covenant would be void as suspending the power of alienation for an indefinite period.<sup>32</sup>

1 1 Smith's Leading Cases, \*27; and see *Brudnell v. Roberts*. 2 Wils. 143; *Norman v. Wells*, 17 Wend. 136; *Armstrong v. Wheeler*, 9 Cow. 88; *Brown v. Staples*, 28 Me. 497.

2 *Spencer's Case*, 5 Rep. 16; *Dolph v. White*, 14 N. Y. 301.

3 *Webb v. Russell*, 3 Term Rep. 402; *Dolph v. White*, 14 N. Y. 301. In order to create a covenant which will run with the land, there should be some privity of estate

between the covenantor and covenantee: *Morse v. Aldrich*, 19 Pick. 449; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Taylor v. Owen*, 2 Blackf. 301, 20 Am. Dec. 115; *Brewer v. Marshall*, 19 N. J. Eq. 537, 97 Am. Dec. 679; *Wheeler v. Schad*, 7 Nev. 204; *Cole v. Hughes*, 54 N. Y. 444, 13 Am. Rep. 611.

4 See 2 *Greenleaf's Cruise on Real Property*, 756; *Kingdom v. Nottle*, 1 Maule & S. 355.

5 See *Dusenbury v. Callaghan*, 8 Hun, 541; *Bethell v. Bethell*, 54 Ind. 428, 23 Am. Rep. 650; *Richard v. Bent*, 59 Ill. 38, 14 Am. Rep. 1; *Copeland v. McAdory*, 100 Ala. 553; secs. 311-313, ante.

6 *Wilson v. Cochran*, 46 Pa. St. 229; *Salmon v. Vallejo*, 41 Cal. 481. In Iowa the covenant for seisin runs with the land: *Schofield v. Iowa Homestead Co.*, 32 Iowa, 317, 7 Am. Rep. 197; *Knadler v. Sharp*, 36 Iowa, 232; and see, also, *Hall v. Plaine*, 14 Ohio St. 417; *Allen v. Kennedy*, 91 Mo. 324; *Maguire v. Riggin*, 44 Mo. 512; *Coleman v. Lyman*, 42 Ind. 289; *Roberts v. Levy*, 3 Abb. Pr., N. S., 311. The covenant against encumbrances runs with the land in Vermont: *Cole v. Kimball*, 52 Vt. 639.

7 *Hurd v. Curtis*, 19 Pick. 459; *McGary v. Hastings*, 39 Cal. 360, 2 Am. Rep. 456; *Schwallback v. Chicago etc. Ry. Co.*, 69 Wis. 292, 2 Am. St. Rep. 740; *Abbott v. Allen*, 14 Johns. 248; *Shelton v. Codman*, 3 Cush. 318; *Hunt v. Amidon*, 4 Hill, 345, 40 Am. Dec. 283.

8 *Hunt v. Amidon*, 4 Hill, 345, 40 Am. Dec. 283; *Logan v. Moulder*, 1 Ark. 313, 33 Am. Dec. 338; *Markland v. Crump*, 1 Dev. & B. 94, 27 Am. Dec. 230; *Campbell v. Lewis*, 3 Barn. & Ald. 392; and see sec. 316, ante.

9 *Withy v. Mumford*, 5 Cow. 137; *Rindskopf v. Farmers' etc. Trust Co.*, 58 Barb. 36; *Claycomb v. Munger*, 51 Ill. 373; *White v. Whitney*, 3 Met. 81; *Burtner v. Keran*, 24 Gratt. 42; *Crisfield v. Storr*, 36 Md. 129, 11 Am. Rep. 480; *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. Rep. 95.

10 *Dean v. Chapter of Windsor's Case*, 5 Rep. 24; and see *Harris v. Coulbourn*, 3 Harr. (Del.) 338.

11 *Easter v. Little Miami R. R. Co.*, 14 Ohio St. 48; *Bronson v. Coffin*, 108 Mass. 175, 11 Am. Rep. 335; *Duffy v. New York etc. R. R. Co.*, 2 Hilt. 496; *Hazlett v. Sinclair*, 76 Ind. 488, 40 Am. Rep. 254; *Midland Ry.*

Co. v. Fisher, 125 Ind. 19, 21 Am. St. Rep. 189; Kellogg v. Robinson, 6 Vt. 276, 27 Am. Dec. 550.

12 Van Rensselaer v. Smith, 27 Barb. 104; Van Rensselaer v. Dennison, 35 N. Y. 393; Hurst v. Rodney, 1 Wash. 375; Worthington v. Hewes, 19 Ohio St. 66.

13 Tatem v. Chaplin, 2 H. Black. 133.

14 Cockson v. Cock, Cro. Jac. 125.

15 Mayor etc. v. Pattison, 10 East, 136; Barron v. Richard, 3 Edw. Ch. 96; 8 Paige, 351, 35 Am. Dec. 713. And compare St. Andrew's Church Appeal, 67 Pa. St. 512.

16 Bush v. Cales, 1 Show. 389; and see Brew v. Van Deman, 6 Heisk. 433; Norfleet v. Cromwell, 64 N. C. 1.

17 Stockett v. Howard, 34 Md. 121.

18 Trustees etc. v. Cowen, 4 Paige, 510, 27 Am. Dec. 80.

19 Fairbanks v. Williamson, 7 Me. 96. Compare Trull v. Eastman, 3 Met. 121, 37 Am. Dec. 126.

20 Barron v. Richard, 8 Paige, 351, 35 Am. Dec. 713; and see Gilmer v. Railway Co., 79 Ala. 569, 58 Am. Rep. 623.

21 Thomas v. Von Kopff, 6 Gill & J. 372.

22 Gaines v. Poor, 3 Met. (Ky.) 503, 79 Am. Dec. 559.

23 Post v. Kearney, 2 N. Y. 394, 51 Am. Dec. 303.

24 Winfield v. Henning, 21 N. J. Eq. 188.

25 Sterling Hydraulic Co. v. Williams, 66 Ill. 393. But compare Mitchell v. Warner, 5 Conn. 497.

26 Flight v. Glossopp, 2 Bing. N. R. 125.

27 Wheelock v. Thayer, 16 Pick. 68; Mitchell v. Warner, 5 Conn. 497. A covenant by the lessor to furnish a supply of water binds an assignee: Jourdain v. Wilson, 4 Barn. & Adol. 266.

28 Harsha v. Reid, 45 N. Y. 415. Compare Brown v. McKee, 57 N. Y. 684.

29 Mayor etc. v. Pattison, 10 East, 136.

30 Brewer v. Marshall, 19 N. J. Eq. 537.

31 London etc. Ry. Co. v. Gomm, 30 Week. Rep. 620; 21 N. Y. Daily Reg. No. 150.

32 London etc. Ry. Co. v. Gomm, 30 Week. Rep. 620; 21 N. Y. Daily Reg. No. 150.

**§ 317a. Same—Continued.**

Covenants which are connected with the estate run with the land, and vest in point of benefit and liability in an assignee.<sup>1</sup> But covenants not contained in grants of the estate do not run with the land.<sup>2</sup> The covenant implied in a deed of grant does not run with the land, nor impress it with any equity which will pass to the grantee.<sup>3</sup> It has been held that a covenant against encumbrances which are a money charge on land runs with the land until they are discharged, and that an action on such covenant can be maintained by an assignee of the covenantee.<sup>4</sup> The covenant of a stranger to the title is personal to the covenantee, and incapable of transmission by a mere conveyance of the land, and in the absence of special facts and circumstances, this rule applies to covenants of a husband in a deed by his wife of her own land, in which the husband joins.<sup>5</sup> The purchaser of a lot subject to a personal restrictive agreement entered into by its owner is bound by the restriction in a court of equity, unless he was a purchaser in good faith, in ignorance of the restriction.<sup>6</sup> In order to hold heirs liable, at common law, upon a covenant of their ancestor, it is necessary to show that they are named therein and have assets by descent sufficient to meet the demand.<sup>7</sup>

1 Hickey v. Railway Co., 51 Ohio, 40, 46 Am. St. Rep. 545.



2 *Fresno Canal Co. v. Rowell*, 80 Cal. 114, 13 Am. St. Rep. 112. See sec. 316a, ante.

3 *Woodward v. Brown*, 119 Cal. 283, 63 Am. St. Rep. 108.

4 *Security Bank v. Holmes*, 65 Minn. 531, 60 Am. St. Rep. 495. But see *Foote v. Burnet*, 10 Ohio, 317, 36 Am. Dec. 90; *Todd v. Johnson*, 51 Iowa, 192.

5 *Mygatt v. Coe*, 152 N. Y. 457, 57 Am. St. Rep. 521.

6 *Lewis v. Gollner*, 129 N. Y. 227, 26 Am. St. Rep. 516; and see *Bald Eagle etc. R. R. Co. v. Nittany etc. R. R. Co.*, 171 Pa. St. 284, 50 Am. St. Rep. 807; sec. 303b, ante.

7 *Rohrbaugh v. Hamblin*, 57 Kan. 393, 57 Am. St. Rep. 334.

### § 318. Damages for Breach of Covenants.

The measure of damages for breach of the covenant of seisin, or of right to convey, is the consideration money and interest.<sup>1</sup> Upon an exchange of lands, the value of the tract conveyed, and not that of the tract received, is the true criterion of damages.<sup>2</sup> The covenant against encumbrances being one of indemnity, the covenantee can recover only nominal damages for a breach thereof, unless he can show that he has sustained actual loss or injury thereby, or has had to pay money to remove the encumbrance;<sup>3</sup> in which case he is entitled to recover a just compensation for such injury,<sup>4</sup> or what money he reasonably ought to have paid to extinguish the encumbrance.<sup>5</sup> The reasonableness of the amount so paid is held to be a question for the jury;<sup>6</sup> but it must not be greater than the value of the land.<sup>7</sup> In the case of a breach of the covenants for quiet

enjoyment or of warranty, the rule generally adopted is that the consideration money, with interest and costs, is the measure of damages.<sup>8</sup> But it has been held in some of the states that damages for breach of these covenants should be ascertained by the value of the land at the time of eviction.<sup>9</sup> For breach of covenant for quiet enjoyment implied in a lease, the measure of damage is the value of the unexpired term at the time of eviction, over and above the rent reserved by the terms of the lease.<sup>10</sup> Where a covenant of seisin, of good right to convey, of quiet enjoyment, or a general warranty, is broken by the subjection of the land to a perpetual easement, which may not be removed by the payment of money, the measure of damages is the consequent depreciation of the land.<sup>11</sup> The value of improvements made by the grantee after the purchase is not an element of damage.<sup>12</sup> In actions for breaches of covenant of warranty the *lex loci rei sitae* controls.<sup>13</sup> It is held in Missouri that damages arising from the breach of covenants in a deed may be assigned, and, when assigned, the assignee, and he alone, can sue.<sup>14</sup>

1 Stubbs v. Page, 2 Me. 378; Leland v. Stone, 10 Mass. 459; Mitchell v. Hazen, 4 Conn. 495, 10 Am. Dec. 169; Dale v. Shively, 8 Kan. 276; Nutting v. Herbert, 35 N. H. 120; Lacey v. Marnan, 37 Ind. 168; Phipps v. Tarpley, 31 Mo. 433; Cox v. Strode, 2 Bibb. 277, 5 Am. Dec. 603; Blake v. Burnham, 29 Vt. 437; Park v. Check, 4 Cold. 20; Robinson v. Coulter, 90 Tenn. 705, 25 Am. St. Rep. 708.

2 Cummins v. Kenned, . 3 Litt. 118, 14 Am. Dec. 45. Compare Farmers' Bank v. Glenn, 68 N. C. 35.

3 Richard v. Bent, 59 Ill. 38, 14 Am. Rep. 1.

4 See Bronson v. Coffin, 108 Mass. 175, 11 Am. Rep. 335.

5 Guthrie v. Russell, 46 Iowa, 269, 26 Am. Rep. 135; and see Schofield v. Iowa Homestead Co., 32 Iowa, 317, 7 Am. Rep. 197; Barlow v. St. Nicholas Nat. Bank, 63 N. Y. 402, 20 Am. Dec. 547; Read v. Pierce, 36 Me. 455, 58 Am. Dec. 761; Eaton v. Lyman, 30 Wis. 41.

6 St. Louis v. Bissell, 46 Mo. 157.

7 Kelsey v. Remer, 43 Conn. 129, 21 Am. Rep. 638; Beecher v. Baldwin, 55 Conn. 419, 3 Am. St. Rep. 57. In no event should the recovery exceed the consideration money for which the deed was given: Andrews v. Appel, 22 Hun, 429. Compare Porter v. Bradley, 7 R. I. 542; Mills v. Catlin, 22 Vt. 106.

8 Staats v. Ten Eyck, 3 Caines, 111, 2 Am. Dec. 254; Mack v. Patchin, 42 N. Y. 167, 1 Am. Rep. 506; Cal. Civ. Code, sec. 3304; McGary v. Hastings, 39 Cal. 360, 2 Am. Rep. 456; Foster v. Thompson, 41 N. H. 379; Wade v. Comstock, 11 Ohio St. 82; Conrad v. Effinger, 87 Va. 59, 24 Am. St. Rep. 646; Dickson v. Desire, 23 Mo. 166; Brooks v. Black, 68 Mo. 161, 24 Am. St. Rep. 259; Crisfield v. Storr, 36 Md. 150, 11 Am. Rep. 480. See Adams v. Conover, 22 Hun, 424. Costs incurred in defending the title will include necessary counsel fees: Dalton v. Bowker, 8 Nev. 190; Harding v. Larkin, 41 Ill. 413; Robertson v. Lemon, 2 Bush, 301; Taylor v. Holter, 1 T. B. Mon. 688; Smith v. Sprague, 40 Vt. 43. Otherwise, in Texas, unless such fees are agreed to be paid: Turner v. Miller, 42 Tex. 418. Mesne profits received by the grantee should be deducted from the interest: Combs v. Tarlton, 2 Dana, 467; Young v. Divine, 12 Week. Dig. 18; and see Foster v. Thompson, 41 N. H. 373; Burton v. Reeds, 20 Ind. 91; Winslow v. McCall, 32 Barb. 241.

9 Horsford v. Wright, Kirby, 3, 1 Am. Dec. 8; Smith v. Sprague, 40 Vt. 43; Hardy v. Nelson, 27 Me. 525; Wyman v. Ballard, 12 Mass. 304; Coleman v. Ballard, 13 La. Ann. 512; Smith v. Strong, 14 Pick. 128.

10 Mack v. Patchin, 42 N. Y. 167, 1 Am. Rep. 506; 29 How. Pr. 20; Williams v. Burrell, 1 Man. G. & S. 402; 5 Eng. Com. L. 401; Lock v. Furze, 115 Eng. Com. L. 96; L. R. 1 Com. P. 441; Rolph v. Crouch, L. R. 3 Ex. 41; and see Myers v. Burns, 35 N. Y. 272.

11 *Clark v. Ziegler*, 79 Ala. 346; 85 Ala. 154; *Copeland v. McAdory*, 100 Ala. 553.

12 *Copeland v. McAdory*, 100 Ala. 553. See, as to measure of damages for breach of warranty where certain privileges were expressly excepted from the operation of the deed: *Brantley Co. v. Johnson*, 102 Ga. 850.

13 *Tillotson v. Prichard*, 60 Vt. 94, 6 Am. St. Rep. 95.

14 *Allen v. Kennedy*, 91 Mo. 324.

### § 319. Acknowledgment of Deed.

It is a universal statutory requirement in the United States that, before a deed can be lawfully recorded, it shall be acknowledged or proved;<sup>1</sup> and it is a well-established rule that the recording of a deed is of no legal effect, unless it has been acknowledged or proved, as prescribed by law.<sup>2</sup> Diversities exist, however, in the laws of the several states, in respect to the officers before whom the acknowledgment may be made, and also in respect to the effect and operation of the acknowledgment.<sup>3</sup> An acknowledgment before the grantee himself is void, and the deed will be good only as between the parties.<sup>4</sup> But an officer is not disqualified to take an acknowledgment by reason of his relationship to the parties.<sup>5</sup> An acknowledgment before a justice of the peace de facto was held sufficient.<sup>6</sup> But separate acknowledgments before two justices of the peace were held to be insufficient.<sup>7</sup> A consul of the United States at a foreign port is a "magistrate," having power to take the acknowledgments of deeds.<sup>8</sup> So a United States judge, empowered to take ac-

knowledgments, may do so in any part of the Union, if the land lies in his own district.<sup>9</sup> But an acknowledgment taken in one county before a justice of the peace of another county, where the land lies, is held to be void.<sup>10</sup> The certificate of acknowledgment will be liberally construed,<sup>11</sup> and the place of acknowledgment need not fully appear from the certificate itself, provided it can be ascertained with sufficient certainty from an inspection of the whole instrument.<sup>12</sup> A date is not essential to the validity of an acknowledgment,<sup>13</sup> and, if omitted, it is presumed to be that of the deed;<sup>14</sup> and if no place is specified, it is presumed to be within the officer's jurisdiction.<sup>15</sup> The official designation or title of the officer certifying must appear;<sup>16</sup> and the certificate must state that the subscribing witness examined by the officer knew the person who executed the deed, and a statement that he saw him sign it is not sufficient proof of his identity.<sup>17</sup> An acknowledgment by one only of several grantors has been deemed sufficient.<sup>18</sup> The act of a magistrate in taking the acknowledgment of a deed is a judicial act,<sup>19</sup> and the certificate of acknowledgment, in the absence of fraud, imposition, or duress, is conclusive as to the facts therein stated.<sup>20</sup> And it is conclusive even in cases of fraud, etc., as to subsequent purchasers for a valuable consideration without notice.<sup>21</sup> But between the immediate parties to a deed, parol evidence is admissible to show fraud

or duress connected with the acknowledgment,<sup>22</sup> or to show that there was, in fact, no acknowledgment.<sup>23</sup> The acknowledgment of an ancient deed renders it admissible in evidence, though not signed or sealed.<sup>24</sup>

1 See *Thomas v. Le Baron*, 8 Met. 355; *Caltin v. Washburn*, 3 Vt. 25; *Stubbs v. Kohn*, 64 Ala. 186; *Carter v. Chandron*, 21 Ala. 72; *Anderson v. Dugas*, 29 Ga. 440; *Chamberlain v. Spargur*, 22 Hun, 437; *Clark v. Troy*, 20 Cal. 219; *Sterlien v. Daley*, 37 Mo. 483; sec. 297, ante.

2 *Work v. Harper*, 24 Miss. 517; *White v. Denman*, 1 Ohio St. 110; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533; *Taylor v. Harrison*, 47 Tex. 454, 26 Am. Rep. 304; *Doe v. Richardson*, 76 Ala. 329; *Chafee v. Blatchford*, 6 Mackey, 459; *Cannon v. Deming*, 3 S. Dak. 421; and see *Wright v. Lancaster*, 48 Tex. 250.

3 Compare *Lynch v. Livingston*, 6 N. Y. 422; *Story v. Smith*, 3 McLean, 362; *Small v. Field*, 102 Mo. 104; *Shaw v. Poor*, 6 Pick. 86, 17 Am. Dec. 347; *Webb v. Den*, 17 How. 576.

4 *Groesbeck v. Seeley*, 13 Mich. 329; *Beaman v. Whitney*, 21 Me. 413; *Amick v. Woodworth*, 58 Ohio St. 86; *Bowden v. Parrish*, 86 Va. 67, 19 Am. St. Rep. 873.

5 *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474.

6 *Brown v. Lunt*, 37 Me. 423.

7 *Ridgely v. Howard*, 3 Har. & McH. 321.

8 *Scanlan v. Wright*, 13 Pick. 523, 25 Am. Dec. 344.

9 *Moore v. Vance*, 1 Ohio, 12.

10 *Share v. Anderson*, 7 Serg. & R. 43, 10 Am. Dec. 41; and see *Gittings v. Hall*, 1 Har. & J. 14, 2 Am. Dec. 502. Such deed is good as between the parties: *Stewart v. Stewart*, 19 Fla. 846. That a justice of the peace may take an acknowledgment out of his own county, see *Odiorne v. Mason*, 9 N. H. 24.

11 See *Ingraham v. Grigg*, 13 Smedes & M. 22; *Morse v. Clayton*, 13 Smedes & M. 373; *Crowley v. Wallace*, 12 Mo. 143; *Chandler v. Spear*, 22 Vt. 388; *Angier v. Schieffelin*, 72 Pa. St. 106, 13 Am. Rep. 659.

12 *Brooks v. Chaplin*, 3 Vt. 281, 23 Am. Dec. 209;

and see *Fuhrman v. London*, 13 Serg. & R. 386, 15 Am. Dec. 608.

13 *Galusha v. Sinclear*, 3 Vt. 394. See *Robertson v. Sullivan*, 2 Yerg. 108; *Pierce v. Brown*, 24 Vt. 165.

14 *Rackleff v. Norton*, 19 Me. 274; and see *Cover v. Manaway*, 115 Pa. St. 338, 2 Am. St. Rep. 552.

15 *Rackleff v. Norton*, 19 Me. 274.

16 *Johnson v. Haines*, 2 Ohio, 55, 15 Am. Dec. 533. Compare *Van Ness v. Banks*, 13 Pet. 7; *Pierce v. Hakes*, 23 Pa. St. 231. The certificate must show that the acknowledgment was taken by an officer authorized by law: *Cassell v. Cooke*, 8 Serg. & R. 268, 11 Am. Dec. 610.

17 *Jackson v. Osborn*, 2 Wend. 555, 20 Am. Dec. 649; and see *Thurman v. Cameron*, 24 Wend. 87; *Salmon v. Huff*, 80 Tex. 133; *Frost v. Cattle Co.*, 81 Tex. 505, 26 Am. St. Rep. 831.

18 *Shaw v. Poor*, 6 Pick. 86; *Catlin v. Ware*, 9 Mass. 218.

19 *Heeter v. Glasgow*, 79 Pa. St. 79, 21 Am. Rep. 46; *Lickmon v. Harding*, 65 Ill. 505.

20 *Heeter v. Glasgow*, 79 Pa. St. 79, 21 Am. Rep. 46; *Miller v. Wentworth*, 82 Pa. St. 280; *Williams v. Baker*, 71 Pa. St. 476; *Cover v. Manaway*, 115 Pa. St. 338, 2 Am. St. Rep. 552; *McNeely v. Rucker*, 6 Blackf. 391.

21 *Williams v. Baker*, 71 Pa. St. 476; *Donahue v. Mills*, 41 Ark. 421; and see *Kerr v. Russell*, 69 Ill. 666, 18 Am. Rep. 634; *Ridgely v. Howard*, 3 Har. & McH. 321.

22 *Miller v. Wentworth*, 82 Pa. St. 280; *Johnson v. Van Velsor*, 43 Mich. 208; and see *Williams v. Robson*, 6 Ohio St. 510; *Hourtienne v. Schnoor*, 33 Mich. 274; *Hays v. Hays*, 5 Rich. 31; *Van Orman v. McGregor*, 23 Iowa, 300; *Wannell v. Kern*, 57 Mo. 478.

23 *Smith v. Ward*, 2 Root, 378, 1 Am. Dec. 80. As to what omissions may be supplied by proof aliunde, see *Augier v. Schieffelin*, 72 Pa. St. 106, 13 Am. Rep. 659. Want of jurisdiction on the part of the officer taking the acknowledgment may be proved by parol: *Cheney v. Nathan*, 110 Ala. 254, 55 Am. St. Rep. 26.

24 *Carroll v. Norwood*, 1 Har. & J. 178; *Wickes v. Caulk*, 5 Har. & J. 36.

**§ 319a. Same—Continued.**

The acknowledgment of a deed is no part of the contract between the parties, but only affords a mode of proof of the contract.<sup>1</sup> The general rule is, that a deed may be valid and binding on the parties who execute it, so as to pass the title to the grantee without any certificate of acknowledgment.<sup>2</sup> The certificate being absent, the execution may be established by other proof.<sup>3</sup> And a deed unacknowledged, but valid between the parties to it and their heirs, is good against all other persons having actual notice of its existence.<sup>4</sup> In California, duplicate certificates of sale of real property by a sheriff are entitled to be recorded without acknowledgment, and after being recorded are constructive notice to all the world.<sup>5</sup> A deed executed by a commission empowered to convey public land may be lawfully acknowledged by the commissioners after their authority has been revoked.<sup>6</sup> It is held that the deed of a corporation may be lawfully acknowledged by the representative of the corporation having authority to execute the deed on its behalf.<sup>7</sup> But an acknowledgment of the deed of a corporation made by individuals instead of by its officers is fatally defective, and its registration void.<sup>8</sup> The acknowledgment of a deed by a grantor who did not himself sign it is a sufficient recognition and adoption of the signature.<sup>9</sup> The record of a deed is not admissible in evidence unless the certificate of



acknowledgment is substantially in accordance with the statute.<sup>10</sup> And an officer, having made a certificate of acknowledgment, cannot afterward amend or change it so as to correct an error or mistake. This can only be done by the parties re-acknowledging the deed.<sup>11</sup> It has been held, on the other hand, that officers taking acknowledgments to deeds have the right and may be compelled at any time to correct mistakes in their certificates.<sup>12</sup> In the absence of fraud, the certificate of acknowledgment of a deed is held to be conclusive of all the facts therein stated.<sup>13</sup> But such a certificate may be impeached by parol evidence that the person named therein never in fact appeared before the officer certifying to the acknowledgment.<sup>14</sup> An ancient deed, which has been recorded about twenty-four years, and is in possession of the party claiming title through it, is presumed genuine though it contains no acknowledgment, if there appears to be nothing suspicious about it.<sup>15</sup>

1 *Blaesi v. Blaesi*, 14 N. Y. Civ. Proc. 216; *Mays v. Hedges*, 79 Ind. 288; *Brown v. Westerfield*, 47 Neb. 399, 53 Am. St. Rep. 532.

2 *Fryer v. Rockefeller*, 63 N. Y. 268; *Westhafer v. Patterson*, 120 Ind. 459, 16 Am. St. Rep. 330; *Rosenthal v. Merced Bank*, 110 Cal. 198; *Roane v. Baker*, 120 Ill. 308; *Edson v. Knox*, 8 Wash. 642; *National Bank v. Hughson*, 5 Wash. 100; *Banbury v. Sherin*, 4 S. Dak. 88; *Cable v. Cable*, 146 Pa. St. 451. But see *Anderson v. Logan*, 99 N. C. 474; *Rust v. Goff*, 94 Mo. 511.

3 *Munger v. Baldrige*, 41 Kan. 236, 13 Am. St. Rep. 273; *Arn v. Matthews*, 39 Kan. 272.

4 *Westerly Sav. Bank v. Manufacturing Co.*, 16 R. I. 497; *Manaudas v. Mann*, 14 Or. 450; *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 73.

5 *Foorman v. Wallace*, 75 Cal. 552. Sufficiency of acknowledgment by deputy sheriff under Texas law: See *Terrell v. Martin*, 64 Tex. 121.

6 *New Hampshire Land Co. v. Tilton*, 19 Fed. Rep. 73; and so, to same effect, *Lemington v. Stevens*, 48 Vt. 38.

7 *Hopper v. Lovejoy*, 47 N. J. Eq. 573; *Missouri Fire Clay Works v. Ellison*, 30 Mo. App. 67.

8 *Bernhardt v. Brown*, 122 N. C. 587, 65 Am. St. Rep. 725.

9 *Lewis v. Watson*, 98 Ala. 479, 39 Am. St. Rep. 82; *Blaisdell v. Leach*, 101 Cal. 405, 40 Am. St. Rep. 65.

10 *Maxwell v. Higgins*, 38 Neb. 671; *Velott v. Lewis*, 102 Pa. St. 327.

11 *Merritt v. Yates*, 71 Ill. 636, 22 Am. Rep. 128; and see *Enterprise Transit Co. v. Sheedy*, 103 Pa. St. 492, 49 Am. Rep. 130.

12 *Westhafer v. Patterson*, 120 Ind. 459, 16 Am. St. Rep. 330.

13 *Burson v. Andes*, 83 Va. 445; *Murrell v. Diggs*, 84 Va. 900, 10 Am. St. Rep. 893.

14 *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622; *Johnston v. Wallace*, 53 Miss. 331, 24 Am. Rep. 699; *O'Neil v. Webster*, 150 Mass. 572; *Le Mesnager v. Hamilton*, 101 Cal. 532, 40 Am. St. Rep. 81; and so, to same effect, *Cheney v. Nathan*, 110 Ala. 254, 55 Am. St. Rep. 26.

15 *Geer v. Mining Co.*, 134 Mo. 85, 56 Am. St. Rep. 489. Record of deed as evidence: See *Johnson v. Drew*, 34 Fla. 130, 43 Am. St. Rep. 172, and note; *Mee v. Benedict*, 98 Mich. 260, 39 Am. St. Rep. 543; *Harlowe v. Hudgins*, 84 Tex. 107, 31 Am. St. Rep. 21.

### § 320. Separate Acknowledgment of, by Married Woman.

Generally speaking, a married woman may, in this country, convey her real estate by a deed exe-

cuted jointly with her husband.<sup>1</sup> But her acknowledgment of the deed, as prescribed by law, is essential to its validity;<sup>2</sup> and without such acknowledgment the deed is wholly inoperative as to her, whatever may be its effect against the husband.<sup>3</sup> And in many of the states the wife is required by statute to undergo an examination separate and apart from the husband, for the purpose of ascertaining whether she acts voluntarily or by undue influence of the husband.<sup>4</sup> And such examination must be personal, and cannot be by attorney;<sup>5</sup> and the certificate of the magistrate must show that in her examination the requirements of the statute were substantially pursued.<sup>6</sup> But, in the absence of fraud, evidence is not admissible, as against a bona fide purchaser, to prove that the wife's acknowledgment was not taken separate and apart from the husband, as the statute required.<sup>7</sup> The general rule is, that when a wife joins her husband in a deed to convey her estate, as to a bona fide purchaser for value, without notice of fraud or imposition in the procurement of the execution of the deed, the certificate of the magistrate who takes the acknowledgment is conclusive as to every material fact expressed therein;<sup>8</sup> but as to him who has notice, or who has parted with no valuable consideration, the wife may avoid the instrument by showing that she was entrapped into the execution of it by craft or treachery, or compelled thereto by force.<sup>9</sup>

Acts of the legislature enacted to cure defects in the acknowledgment of deeds by married women are constitutional, although they extend to deeds acknowledged previous to their passage;<sup>10</sup> but it is held that such acts do not affect judgments rendered prior to their passage.<sup>11</sup> And such legislation is sustainable only because it is supposed not to operate upon the deed or contract by changing it, but upon the mode of proof.<sup>12</sup>

1 Sec. 283, ante.

2 *Steffey v. Steffey*, 19 Md. 5; *Logan v. Gardner*, 136 Pa. St. 588, 20 Am. St. Rep. 939; *Tatum v. St. Louis*, 125 Mo. 647; *Hepburn v. Dubois*, 12 Pet. 345; *Constantine v. Van Winkle*, 2 Hill, 240; *Bruce v. Wood*, 1 Met. 542, 35 Am. Dec. 380; *Platt v. Battells*, 28 Vt. 685; *Bank of Healdsburg v. Bailhache*, 65 Cal. 327. But compare *Hutchinson v. Ainsworth*, 73 Cal. 458, 2 Am. St. Rep. 823; *Banbury v. Arnold*, 91 Cal. 606; *Hayden v. Moffatt*, 74 Tex. 647, 15 Am. St. Rep. 866.

3 *Grove v. Todd*, 41 Md. 633, 20 Am. Rep. 76; *Gebb v. Rose*, 40 Md. 387; *Mariner v. Saunders*, 5 Gilm. 113; and see *Beal v. Harmon*, 38 Mo. 435; *Hoskinson v. Adkins*, 77 Mo. 537; *Drury v. Foster*, 2 Wall. 24; *Churchill v. Monroe*, 1 R. I. 209.

4 See 2 Kent's Commentaries, 150 et seq.; *Etheridge v. Forebee*, 9 Ired. 312; *Bryan v. Stump*, 8 Gratt. 241, 56 Am. Dec. 139; *Elliott v. Piersoll*, 1 McLean, 13; *Meriam v. Harsen*, 2 Barb. Ch. 232; *Parker v. Chancellor*, 73 Tex. 475. The separate acknowledgment of deeds by married women is no longer required in New York: See Laws 1880, c. 300. Nor is it required in Massachusetts: *White v. Groves*, 107 Mass. 325, 9 Am. Rep. 28.

5 *Dawson v. Shirley*, 6 Blackf. 531. So the execution of the deed must be her own personal act, and it is not sufficient that her husband signs her name, though in her presence and by her direction: *Linsley v. Brown*, 13 Conn. 192; and see *Sumner v. Conant*, 10 Vt. 9.

6 *Elwood v. Klock*, 13 Barb. 50; *Owen v. Norris*, 5

Blackf. 479; Daniel v. Priest, 12 Miss. 544; Johnston v. Wallace, 53 Miss. 331, 24 Am. Rep. 699; Etheridge v. Forebee, 9 Ired. 312; Ives v. Sawyer, 4 Dev. & B. 55; Meddock v. Williams, 12 Ohio, 377; Clinch River Veneer Co. v. Kurth, 90 Va. 737.

7 Johnston v. Wallace, 53 Miss. 331, 24 Am. Rep. 699; sec. 319, ante.

8 Singer Mfg. Co. v. Rook, 84 Pa. St. 442, 24 Am. Rep. 204.

9 Heeter v. Glasgow, 79 Pa. St. 79, 21 Am. Rep. 46; and see Baldwin v. Snowden, 11 Ohio St. 203; Williams v. Woodard, 2 Wend. 486; Hartley v. Fresh, 6 Tex. 216; sec. 319, ante.

10 Tate v. Stooltzfoos, 16 Serg. & R. 35, 16 Am. Dec. 546; Shonk v. Brown, 61 Pa. St. 321; Dulany v. Tilghman, 6 Gill & J. 461; Watson v. Mercer, 8 Pet. 88; and see Dentzell v. Waldie, 30 Cal. 139; Goshorn v. Purcell, 11 Ohio St. 641; Green v. Abraham, 43 Ark. 424; Johnson v. Richardson, 44 Ark. 373; Johnson v. Taylor, 60 Tex. 369. But compare Rich v. Flanders, 39 N. H. 304.

11 Barnet v. Barnet, 15 Serg. & R. 72, 16 Am. Dec. 516; and compare Grove v. Todd, 41 Md. 633, 20 Am. Rep. 76.

12 Journeay v. Gibson, 56 Pa. St. 57; Watson v. Mercer, 8 Pet. 88.

### § 320a. Same—Continued.

It is held that, in taking and certifying acknowledgments of deeds of married women, a substantial compliance with the statute is all that is required.<sup>1</sup> Hence the words "willingly acknowledged the same," in a certificate of acknowledgment by a married woman, must be treated as the equivalent of the words "willingly executed the same," prescribed in the statutory form.<sup>2</sup> But the acknowledgment, to be effectual in passing her estate, must be positive and direct, and

not left to mere inference.<sup>3</sup> It is held that if a proper privy examination of the wife was had, and an improper certificate of acknowledgment made by mistake, it may be corrected, but that if a proper examination was not made, it cannot be cured.<sup>4</sup> A bond for title by a married woman and her husband, to land conveyed to her for her sole and separate use, "with full power and authority as a feme sole" to convey it in any manner, is valid, notwithstanding there was no privy acknowledgment by her.<sup>5</sup> An acknowledgment by a married woman, after her husband's death, to a deed to her separate property, executed during coverture, does not validate the deed, even as against herself;<sup>6</sup> otherwise, where the requisites of the execution of the deed are complied with at any time during the coverture of the parties.<sup>7</sup> In California, "a grant or conveyance of real property made by a married woman may be made, executed, and acknowledged in the same manner and has the same effect as if she were unmarried."<sup>8</sup>

1 *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622.

2 *Pickens v. Knisely*, 29 W. Va. 1, 6 Am. St. Rep. 622.

3 *Hanley v. Investment Co.*, 44 W. Va. 450.

4 *Garth v. Fort*, 83 Tenn. 683. See sec. 319a, ante.

5 *Peterson v. Richman*, 93 Tenn. 71. So, to same effect, *Small v. Field*, 102 Mo. 104. And see *Knight v. Paxton*, 124 U. S. 552, construing Illinois statute.

6 *Chester v. Breitling* (Tex. Civ. App.), 30 S. W. Rep. 464.

7 *Chester v. Breitling* (Tex. Civ. App.), 30 S. W. Rep. 464; *Halbert v. Hendrix* (Tex. Civ. App.), 26 S. W. Rep. 911.

8 Cal. Civ. Code, sec. 1093, amendment of 1895.

### § 321. Registration of.

In the United States provision is made by statute for the registration of all deeds and conveyances of land;<sup>1</sup> but registration is not requisite to the validity of a deed between the parties.<sup>2</sup> An unregistered deed is void only as to creditors and subsequent bona fide purchasers without notice.<sup>3</sup> A conveyance duly acknowledged and registered is constructive notice to and conclusive on all persons claiming through or under the grantor.<sup>4</sup> And it is a well-established rule, recognized both at law and in equity, that if a subsequent purchaser has actual or presumptive notice at the time of his purchase of any prior unregistered conveyance, he shall not be permitted to avail himself of his title against that conveyance.<sup>5</sup> Creditors are also bound by notice of an unregistered deed.<sup>6</sup> A deed must be legally recordable and duly recorded according to law, in order to make the record thereof constructive notice.<sup>7</sup> An index of the record of conveyances is not notice;<sup>8</sup> but a deed filed for record and recorded is notice, although the officer fail to index it.<sup>9</sup> And a deed once duly recorded is thenceforth notice to all the world, even though the record be totally destroyed.<sup>10</sup> And it is held that a deed, though

registered after the expiration of the time limited by statute for recording deeds, is notice to all purchasers after the conveyance has been placed upon record.<sup>11</sup> The fact of notice to a subsequent purchaser sufficient to supply the want of registry of a prior deed may be inferred from circumstances as well as proved by direct evidence;<sup>12</sup> but the proof must be such as to affect the conscience of the purchaser, and so strong and clear as to fix upon him the imputation of mala fides.<sup>13</sup> And it is held that a purchaser is not affected with constructive notice of a prior unrecorded conveyance by the mere fact that he was one of the subscribing witnesses thereto.<sup>14</sup> And knowledge merely of an intended conveyance is not sufficient notice.<sup>15</sup>

1 See 4 Kent's Commentaries, 456; *West v. Randall*, 2 Mason, 306; *Morton v. Robard*, 4 Dana, 258; *Dawson v. Thruston*, 2 Hen. & M. 132. The admission of a deed to record is a mere ministerial act: *Dawson v. Thruston*, 2 Hen. & M. 132. And registry laws are to be liberally construed: *Fort v. Burch*, 6 Barb. 60. Compare *Peck v. Mallams*, 10 N. Y. 518; *Sinclair v. Slawson*, 44 Mich. 123, 38 Am. Rep. 235. No system of registration prevails generally in England, but registry acts have been in force in certain English counties since the time of Anne: 2 Greenleaf's Cruise on Real Property, 848, 865; *Honeycomb v. Waldron*, 2 Strange, 1064. It is, however, a common practice to enroll a deed for safe custody by having it transcribed upon the records of the court, whereby it becomes a deed recorded, but the enrollment is evidence only against the party who sealed the deed, and those claiming under him: 2 Greenleaf's Cruise on Real Property, 867. See *Jackson v. Wood*, 12 Johns. 74; *Givan v. Doe*, 7 Blackf. 210; *Chandler v. Chandler*, 55 Cal. 267.



2 McCaskle v. Amarine, 12 Ala. 17; Hill v. Epley, 31 Pa. St. 335; Wood v. Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Walker v. Coltraine, 6 Ired. Eq. 79; Belk v. Massey, 11 Rich. 614; Self v. Haun, 2 Tenn. Cas. 123; Sanders v. Everett, 3 Tenn. Ch. 523; Doran v. Dazey, 5 N. Dak. 167, 57 Am. St. Rep. 550.

3 M'Connell v. Reed, 2 Scam. 374; Snodgrass v. Ricketz, 13 Cal. 359; Losey v. Simpson, 11 N. J. Eq. 246; Vance v. M'Nairy, 3 Yerg. 171; Bellas v. McCarty, 10 Watts, 13; Van Rensselaer v. Clark, 17 Wend. 25, 31 Am. Dec. 280; Derbes v. Romero, 32 La. Ann. 927; Warnock v. Harlow, 96 Cal. 298, 31 Am. St. Rep. 209; Anthony v. Wheeler, 130 Ill. 128, 17 Am. St. Rep. 281; Shirk v. Thomas, 121 Ind. 147, 16 Am. St. Rep. 381; Bates v. Cobb, 29 S. C. 395, 13 Am. St. Rep. 742; Evans v. Templeton, 69 Tex. 375, 5 Am. St. Rep. 71.

4 Schutt v. Large, 6 Barb. 373; Flynt v. Arnold, 2 Met. 619; Bates v. Norcross, 14 Pick. 231; Doe v. Beardsley, 2 McLean, 412; Johnson v. Staggs, 2 Johns. 510; Rogers v. Burchard, 34 Tex. 453, 7 Am. Rep. 283; Tilton v. Hunter, 25 Me. 11. The date of a registry is of the time of the delivery of the deed with the proper officer, at the office of registration: Dubose v. Young, 10 Ala. 365; Gill v. Fauntleroy, 8 B. Mon. 177; Davis v. Ownsby, 14 Mo. 175; McCabe v. Gray, 20 Cal. 509; Metts v. Bright, 4 Dev. & B. 173.

5 Jackson v. Sharp, 9 Johns. 163; Schutt v. Large, 6 Barb. 373; Corliss v. Corliss, 8 Vt. 373; Martin v. Quattlebam, 3 McCord, 205; Trull v. Bigelow, 16 Mass. 418; Draper v. Bryson, 17 Mo. 71; Morrison v. Wilson, 13 Cal. 494; Watkins v. Edwards, 23 Tex. 443; Morrison v. Kelly, 22 Ill. 610.

6 Swan v. Moore, 14 La. Ann. 833; Doe v. Beardsley, 2 McLean, 421; Jackson v. Leek, 19 Wend. 339. See Martin v. Dryden, 6 Ill. 188.

7 Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772; and see Musgrove v. Bonser, 5 Or. 313, 20 Am. Rep. 737.

8 Gilchrist v. Gough, 63 Ind. 576, 30 Am. Rep. 250. See Pringle v. Dunn, 37 Wis. 449, 19 Am. Rep. 772.

9 Chatham v. Bradford, 50 Ga. 327, 15 Am. Rep. 692; Davis v. Whitaker, 114 N. C. 279, 41 Am. St. Rep. 793; Mutual Life Ins. Co. v. Dake, 87 N. Y. 257; Bishop v. Schneider, 46 Mo. 472, 2 Am. Rep. 533; and see Schell v.

Stein, 76 Pa. St. 398, 18 Am. Rep. 416. Compare sec. 321a, post.

10 Shannon v. Hall, 72 Ill. 354, 22 Am. Rep. 146; Deming v. Miles, 35 Neb. 739, 37 Am. St. Rep. 464.

11 Frisler v. Frisler, 38 Ind. 282; Brannon v. May, 42 Ind. 92; Anderson v. Dugas, 29 Ga. 440; Leger v. Doyle, 11 Rich. 109; McRaven v. McGuire, 9 Smedes & M. 34.

12 Troup v. Hurlbut, 10 Barb. 354; Hunter v. Watson, 12 Cal. 363; Helms v. May, 29 Ga. 121; Jones v. Loggins, 37 Miss. 546; Watkins v. Edwards, 23 Tex. 443; and see Lake v. Hancock, 38 Fla. 53, 56 Am. St. Rep. 159.

13 Dooley v. Walcott, 4 Allen, 406; Jackson v. Given, 8 Johns. 137; Nutting v. Herbert, 37 N. H. 346; Dey v. Dunham, 2 Johns. Ch. 182; Mundy v. Vawter, 3 Gratt. 545.

14 Vest v. Michie, 31 Gratt. 149, 31 Am. Rep. 722.

15 Cushing v. Heard, 4 Pick. 252; Warden v. Adams, 15 Mass. 233. The mere act of recording a deed, when done by the grantor, is only prima facie evidence of delivery to the grantee, and is liable to be rebutted: Gilbert v. Fire Ins. Co., 23 Wend. 43; Hawkes v. Pike, 105 Mass. 560, 7 Am. Rep. 554; Derry Bank v. Webster, 44 N. H. 267; Union Mut. Ins. Co. v. Campbell, 95 Ill. 267, 35 Am. Rep. 166.

### § 321a. Same—Continued.

Recording a void deed gives it no validity, and a bona fide purchaser, under such void deed, acquires no title and can convey none.<sup>1</sup> The registration of a tax deed void upon its face imparts notice to no one.<sup>2</sup> And the legal rights of the parties are unaffected by the recording of a forged deed.<sup>3</sup> Registration of a married woman's deed not properly acknowledged is illegal, and does not constitute notice.<sup>4</sup> The record of a deed is notice only to those who are bound to search for it, including parties subsequently deal-

5 Maul v. Rider, 59 Pa. St. 167.

6 Davis v. Monroe, 187 Pa. St. 212, 67 Am. St. Rep. 581.

7 Karns v. Olney, 80 Cal. 90, 13 Am. St. Rep. 101; Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108; and see Corey v. Smalley, 106 Mich. 257, 58 Am. St. Rep. 474.

8 Doran v. Dazey, 5 N. Dak. 167, 57 Am. St. Rep. 550, and note; Lake v. Hancock, 38 Fla. 53, 56 Am. St. Rep. 159.

9 Hudson etc. Co. v. Gravel Co., 140 Mo. 103, 62 Am. St. Rep. 722.

10 Mitchell v. Aten, 37 Kan. 33, 1 Am. St. Rep. 231.

11 Deming v. Miles, 35 Neb. 739, 37 Am. St. Rep. 464; Parrish v. Mahany, 10 S. Dak. 276, 66 Am. St. Rep. 715. See, also, Mangold v. Barlow, 61 Miss. 593, 48 Am. Rep. 84.

12 Parrish v. Mahany, 10 S. Dak. 276, 66 Am. St. Rep. 715. But see Turman v. Bell, 54 Ark. 273, 26 Am. St. Rep. 35.

13 Parrish v. Mahany, 10 S. Dak. 276, 66 Am. St. Rep. 715.

14 Woodward v. Brown, 119 Cal. 283, 63 Am. St. Rep. 108. See Parrish v. Mahany, 10 S. Dak. 276, 66 Am. St. Rep. 715.

15 See Ritchie v. Griffiths, 1 Wash. 429, 22 Am. St. Rep. 155; St. Croix etc. Co. v. Ritchie, 73 Wis. 409; Hiles v. Atlee, 80 Wis. 219, 27 Am. St. Rep. 32. Otherwise in Pennsylvania: Stockwell v. McHenry, 107 Pa. St. 237, 52 Am. Rep. 475.

16 Cox v. Stern, 170 Ill. 442, 62 Am. St. Rep. 385.

17 See Ritchie v. Griffiths, 1 Wash. 429, 22 Am. St. Rep. 155; Davis v. Ward, 109 Cal. 189, 50 Am. St. Rep. 30; Gilchrist v. Gough, 63 Ind. 589, 30 Am. Rep. 257; Brydon v. Campbell, 40 Md. 331; Todd v. Union etc. Inst., 118 N. Y. 346.

18 See, as sustaining this view, Mangold v. Barlow, 61 Miss. 593, 48 Am. Rep. 84; Clader v. Thomas, 89 Pa. St. 343; Sinclair v. Slawson, 44 Mich. 125, 38 Am. Rep. 236.

19 Stiles v. Japhet, 84 Tex. 91.

**§ 322. Canceling Deeds.**

Courts of equity have undoubtedly jurisdiction to compel the surrender and cancellation of deeds obtained by fraud, or held for inequitable and unconscientious purposes;<sup>1</sup> and this, notwithstanding the party seeking relief may have a defense at law to the instrument.<sup>2</sup> The suppression by a husband of the fact that his wife was under age at the time of executing a conveyance is sufficient ground for an order setting it aside;<sup>3</sup> and so of false representations to a wife at the time of procuring her acknowledgment of a deed.<sup>4</sup> But a deed void on its face, for want of the acknowledgment required in a conveyance by a married woman, will not, on that ground, be ordered to be set aside.<sup>5</sup> And, generally speaking, a court of equity will not compel the owner of a deed to deliver it up as being void, where the defectiveness is apparent on the face of the deed, and does not require extrinsic evidence to prove it.<sup>6</sup> Merely delivering back the grantor's deed will not operate to divest the grantee's title.<sup>7</sup> Nor will the destruction of the deed, though by mutual consent of all the parties thereto, have this effect.<sup>8</sup> But in some of the states the canceling of an unregistered deed by agreement of parties, with intent thereby to revest the title in the grantor, is permitted to operate as a reconveyance.<sup>9</sup> A title to lands duly authenticated by written evidence will not be set aside on the as-

sumption of a previous lost conveyance, except upon clear proof of the existence and execution of the supposed deed, and so much of its contents as will enable the court to determine the character of the instrument.<sup>10</sup> Title is not revested in the grantor by the mere nonclaim of the grantee and the nonchange of possession.<sup>11</sup> And title acquired by deed will not be affected by nonuser, since mere nonuser, however long continued, does not create an abandonment.<sup>12</sup> Nor can an estate which has once vested in the grantee be defeated by a condition subsequent which is either impossible, illegal, or repugnant to the estate granted.<sup>13</sup> But it is held that grants of land covered by navigable streams, though made by state officers under power to grant vacant lands, may be subsequently revoked by the state.<sup>14</sup>

1 *Hamilton v. Cummings*, 1 Johns. Ch. 517; *Van Doren v. Mayor etc.*, 9 Paige, 388; *Walker v. Hunter*. 27 Ga. 336; *Fonda v. Sage*, 48 N. Y. 187; *Rice v. Hall* (Ky. Ct. App., 1897), 42 S. W. Rep. 99; *Hayward v. Dimsdale*, 17 Ves. 111.

2 *Hamilton v. Cummings*, 1 Johns. Ch. 517.

3 *Bryan v. Primm*, 1 Ill. 33. Compare *Trippe v. Trippe*, 29 Ala. 637.

4 *Jewett v. Linberger*, 3 Pittsb. 157.

5 *Elliott v. Peirsoll*, 1 McLean, 11.

6 *Peirsoll v. Elliott*, 6 Pet. 95; *Ward v. Dewey*, 16 N. Y. 519; *Gray v. Coan*, 23 Iowa, 344; *Simpson v. Lord Howden*, 3 Mylne & C. 97.

7 *Tomson v. Ward*, 1 N. H. 9; *Botsford v. Morehouse*, 4 Conn. 550; *Taliaferro v. Rolton*, 34 Ark. 503; *Steel v. Steel*, 4 Allen, 417; *Fawcetts v. Kinney*, 33 Ala. 264; *Kimball v. Greig*, 47 Ala. 230; *Kearsing v. Kilian*, 18

Cal. 491; *Lawton v. Gordon*, 34 Cal. 38, 91 Am. Dec. 671; *Campbell v. Jones*, 52 Ark. 497; and see *Doe v. Long*, 64 N. C. 296; *Tunstall v. Cobb*, 109 N. C. 316; *Ward v. Lumley*, 5 Hurl. & N. 94. Compare *Dodge v. Dodge*, 33 N. H. 495; *Patterson v. Yeaton*, 47 Me. 308.

8 *Steel v. Steel*, 4 Allen, 417; *Carver v. McNulty*, 39 Pa. St. 473; *Raynor v. Wilson*, 6 Hill, 469; *Girnon v. Davis*, 36 Ala. 589; *Brown v. Westerfield*, 47 Neb. 399, 53 Am. St. Rep. 532; *Potter v. Adams*, 125 Mo. 118, 46 Am. St. Rep. 478; *Watters v. Wagley*, 53 Ark. 509, 22 Am. St. Rep. 232.

9 See *Nason v. Grant*, 21 Me. 160; *Beauchamp's Will*, 4 T. B. Mon. 361; *Faulks v. Burns*, 16 N. J. Eq. 250.

10 *Metcalf v. Van Benthuyssen*, 3 N. Y. 424.

11 *King v. Coleman*, 98 Tenn. 561.

12 *Conabeer v. Railroad Co.*, 156 N. Y. 474.

13 *Ricketts v. Railway Co.*, 91 Ky. 221, 34 Am. St. Rep. 176.

14 *Heyward v. Mining Co.*, 42 S. C. 138, 46 Am. St. Rep. 702.

### § 322a. Assignment of Deed.

An assignment in the following words, "I assign the within, for value received," indorsed upon and immediately following the words of a deed, and duly acknowledged and signed by the grantee named therein, is sufficient to vest the title to the land described in the deed in the assignee named in such assignment.<sup>1</sup> The technical words that are wanting in an assignment standing by itself are supplied by a reference to "the within deed" for a description of the estate.<sup>2</sup>

1 *Harlowe v. Hudgins*, 84 Tex. 107, 31 Am. St. Rep. 21.

2 *Lemon v. Graham*, 131 Pa. St. 447.

**§ 323. Reformation of Deeds.**

Mistakes in deeds may be reformed in equity, and especially in cases where the mistake consists in the omission or insertion of words or clauses contrary to the intention of the parties.<sup>1</sup> But, as a general rule, mistakes in such instruments can be so reformed only as between the original parties thereto, or those claiming under them in privity;<sup>2</sup> and in the case of a voluntary deed, a court of equity will not reform a mistake therein unless under very extraordinary circumstances, or by consent of all the parties.<sup>3</sup> Mistake may be shown by parol evidence,<sup>4</sup> but the proof must be satisfactory.<sup>5</sup> And after the lapse of a long period of time, a court of equity will not interfere to reform a deed, except upon the most positive and satisfactory evidence of the intention of the parties at the time of its execution.<sup>6</sup> Equity will not correct a mutual mistake in the description in a deed as against an innocent third party without notice, or without knowledge of facts and circumstances sufficient to put him upon inquiry which, if pursued with diligence, would lead to notice of the mistake.<sup>7</sup>

1 Black v. Stone, 33 Ala. 327; Hendrickson v. Wallace, 31 N. J. Eq. 604; Darling v. Osborne, 51 Vt. 148; O'Neil v. Clark, 33 N. J. Eq. 444; McTucker v. Taggart, 29 Iowa, 478; Green v. Dickson, 119 Ala. 346, 72 Am. St. Rep. 920; Trusdell v. Lehman, 47 N. J. Eq. 218; Parker v. Parker, 88 Ala. 362, 16 Am. St. Rep. 52; Walker v. Armstrong, 8 De Gex, M. & G. 531. And even where the parties understood the language contained in the deed,

if they believed the description corresponded with the actual boundaries of the land intended to be conveyed and were mistaken, the case for a reformation is clearly made out: *Bush v. Hicks*, 60 N. Y. 298; *Paine v. Upton*, 87 N. Y. 327, 41 Am. Rep. 371. Compare *Barnes v. Bartlett*, 47 Ind. 98; *Bradford v. Bradford*, 54 N. H. 463; *Farley v. Bryant*, 32 Me. 474; *Williams v. Hamilton*, 104 Iowa, 423, 65 Am. St. Rep. 475, and note.

2 *Simpson v. Montgomery*, 25 Ark. 365; *Baskins v. Calhoun*, 45 Ala. 582; *Rhodes v. Outcalt*, 48 Mo. 367.

3 *Turner v. Collins*, L. R. 7 Ch. App. 342; *Lister v. Hodgson*, 4 Eq. Cas. 30; *Woodruff v. Morristown Inst. etc.*, 34 N. J. Eq. 174; *Brown v. Kennedy*, 33 Beav. 133. Compare *Eaton v. Eaton*, 15 Wis. 259; *Adair v. McDonald*, 42 Ga. 506; *Custard v. Custard*, 25 Tex. 49; *Powell v. Morisey*, 98 N. C. 426, 2 Am. St. Rep. 343.

4 *Bush v. Hicks*, 60 N. Y. 298; *Van Donge v. Van Donge*, 23 Mich. 321; *Huss v. Morris*, 63 Pa. St. 367.

5 *Hileman v. Wright*, 9 Ind. 126; *Durant v. Bacot*, 13 N. J. Eq. 201; *Mulock v. Mulock*, 31 N. J. Eq. 594; *Green v. Stone*, 54 N. J. Eq. 387, 55 Am. St. Rep. 577, and note; *Robinson v. Bradden*, 44 W. Va. 183; *Harding v. Long*, 103 N. C. 1, 14 Am. St. Rep. 775.

6 *Durant v. Bacot*, 15 N. J. Eq. 411; *Seeley v. Baldwin*, 185 Ill. 211; *Nicoll v. Mason*, 49 Ill. 358. Compare *Hutson v. Fumas*, 31 Iowa, 154; *Boyertown Nat. Bank v. Hartman*, 147 Pa. St. 558. Effect of acceptance of deed of correction by grantee: See *Fox v. Windes*, 127 Mo. 502, 48 Am. St. Rep. 648.

7 *Harms v. Coryell*, 177 Ill. 496; *Barton v. Mayers*, 183 Ill. 360.

## § 324. Quitclaim Deeds.

A form of conveyance corresponding with a release at common law, and known as a "quitclaim deed," has long been in use in this country, and in some of the states is recognized by express statute.<sup>1</sup> The operative words of the deed are "release, remise, and quitclaim," and such deed



purports to convey and does convey no more than the present interest of the grantor, and does not operate to pass an interest such as may afterward vest.<sup>2</sup> No estoppel can in general arise from a deed of quitclaim;<sup>3</sup> and the grantee is said to take the risk of the title unless there is fraud.<sup>4</sup> But if a grantor has, in fact, a good title, his deed of quitclaim conveys his title and estate as effectually as a deed of warranty.<sup>5</sup> And it has been held that a recorded, unrestricted, quitclaim deed takes precedence of a prior unrecorded warranty deed of the same premises by the same grantor.<sup>6</sup> On the other hand, it is held that one claiming under a quitclaim deed is not a bona fide purchaser within the registry laws.<sup>7</sup> Deeds given by public officers, such as sheriffs, administrators, etc., to purchasers at judicial sales, belong to the class of quitclaim deeds, and the purchaser takes only such interest as the debtor or decedent actually had.<sup>8</sup>

1 See *Brown v. Jackson*, 3 Wheat. 452; *Jackson v. Hubble*, 1 Cow. 613; *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108; *Packard v. Moss*, 68 Cal. 129; *Bogv v. Schoab*, 13 Mo. 380; *Dart v. Dart*, 7 Conn. 255; *Kyle v. Kavanagh*, 103 Mass. 356, 4 Am. Rep. 560; *Kerr v. Freeman*, 33 Miss. 292.

2 *Morse v. Godfrey*, 3 Story, 365; *Bragg v. Paulk*, 42 Me. 517; *Allison v. Thomas*, 72 Cal. 562, 1 Am. St. Rep. 89; *Pleasants v. Blodgett*, 39 Neb. 741, 42 Am. St. Rep. 624; *Webster v. Webster*, 33 N. H. 22, 66 Am. Dec. 706. See *Givan v. Doe*, 7 Blackf. 212; *Hannon v. Christopher*, 34 N. J. Eq. 459.

3 *San Francisco v. Lawton*, 18 Cal. 465, 79 Am. Dec. 187; and see *Rogers v. Burchard*, 34 Tex. 441, 7 Am. Rep. 283.

4 Doyle v. Knapp, 4 Ill. 338; Chaffin v. Chaffin, 4 Gray, 230; Coe v. Persons Unknown, 43 Me. 432.

5 Kyle v. Kavanagh, 103 Mass. 356, 4 Am. Rep. 560; and see Webster v. Webster, 33 N. H. 22; Berry v. Billings, 44 Me. 416, 69 Am. Dec. 107; Fairley v. Fairley, 34 Miss. 18; Pugh v. Chesseldine, 11 Ohio, 109, 37 Am. Dec. 414.

6 Brown v. Banner Coal etc. Co., 97 Ill. 214, 37 Am. Rep. 105; Pettingill v. Devlin, 35 Iowa, 354; Graff v. Middleton, 43 Cal. 341; Frey v. Clifford, 44 Cal. 335; Schott v. Dosh, 49 Neb. 187, 59 Am. St. Rep. 531; Wilhelm v. Wilken, 149 N. Y. 447, 52 Am. St. Rep. 743; Cutler v. James, 64 Wis. 173, 54 Am. Rep. 603; Chapman v. Sims, 53 Miss. 154; Moelle v. Sherwood, 148 U. S. 21; Hope v. Blair, 105 Mo. 85, 24 Am. St. Rep. 366; Merrill v. Hutchinson, 45 Kan. 59, 23 Am. St. Rep. 713.

7 Rogers v. Burchard, 34 Tex. 441, 7 Am. Rep. 283; Taylor v. Harrison, 47 Tex. 454, 26 Am. Rep. 304; Marshall v. Roberts, 18 Minn. 405, 10 Am. Rep. 201; Adams v. Cuddy, 13 Pick. 460; Johnson v. Williams, 37 Kan. 179, 1 Am. St. Rep. 243; Steele v. Sioux Valley Bank, 79 Iowa, 339, 18 Am. St. Rep. 370; Snow v. Lake, 20 Fla. 656, 51 Am. Rep. 625; Thorn v. Newsom, 64 Tex. 161, 53 Am. Rep. 747; Wood v. Holly Mfg. Co., 100 Ala. 326, 46 Am. St. Rep. 56; Garrett v. Christopher, 74 Tex. 453, 15 Am. St. Rep. 850; Peters v. Cartier, 80 Mich. 124, 20 Am. St. Rep. 508; and see Smith v. Bank of Mobile, 21 Ala. 124; Oliver v. Platt, 3 How. 410; Bragg v. Paulk, 42 Me. 502; Hockenhull v. Oliver, 80 Ga. 89, 12 Am. St. Rep. 235; Eoff v. Irvine, 108 Mo. 378, 32 Am. St. Rep. 609; May v. Le Claire, 11 Wall. 232.

8 See Love v. Jones, 4 Watts, 473; Hamilton v. Doolittle, 37 Ill. 473; Ennis v. Lead, 1 Ired. Eq. 416; Wilson v. Cochran, 14 N. H. 397; Dwight v. Newell, 3 N. Y. 185; White v. Brocam, 14 Ohio St. 339; Osterman v. Baldwin, 6 Wall. 119; Furnival v. Coombes, 5 Man. & G. 736.

## CHAPTER XXVI.

### DEVISE.

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## § 325. Definition and Nature of.

A conveyance by devise is a disposition of real property in a person's last will and testament, to take effect on the death of the devisor.<sup>1</sup> The power of devising lands is said to have existed in the time of the Saxons, but was taken away upon the introduction of the feudal system, as being inconsistent with the principles of the feudal law.<sup>2</sup> But a custom of devising lands by means of uses became general, and so continued until uses were changed into legal estates by the statute of uses,<sup>3</sup> when this custom was effectually abolished.<sup>4</sup> Soon afterward, however, by statute 32 Henry VIII, chapter 1, known as the statute of wills, every proprietor of land was empowered to devise a portion of it.<sup>5</sup> This enactment was followed by the explanatory statute of 34 & 35

Henry VIII, chapter 5,<sup>6</sup> and upon the abolition of military tenures, in the early part of the reign of Charles II, the disposition of real property by devise became absolute.<sup>7</sup> The English statutes of devise, under such modifications as were deemed expedient, were incorporated into our colonial jurisprudence, and lands may be devised by will in all the states of the Union.<sup>8</sup> In propriety of language the word "devise" means a testamentary disposition of land.<sup>9</sup> And the word "devisee," in its technical sense, means one to whom lands or other real estate are devised.<sup>10</sup>

1 2 Blackstone's Commentaries, 372; 3 Greenleaf's Cruise on Real Property, 3; Hogan v. Jackson, Cowp. 305; Kinnard v. Kinnard, 1 Spear, 256; Turner v. Scott, 51 Pa. St. 126; Carlton v. Cameron, 54 Tex. 72, 38 Am. Rep. 620. Will defined: See Barney v. Hayes, 11 Mont. 571, 28 Am. St. Rep. 495. A joint will conditioned to take effect on the death of both is invalid: Hershy v. Clark, 35 Ark. 17, 37 Am. Rep. 1.

2 2 Blackstone's Commentaries, 372, 374; 4 Kent's Commentaries, 503, 504. See Marston v. Norton, 5 N. H. 210.

3 See sec. 151, ante; Wright v. Trustees etc., 1 Hoff. Ch. 252.

4 4 Kent's Commentaries, 504; Wild's Case, 6 Rep. 16b.

5 2 Blackstone's Commentaries, 375; 3 Greenleaf's Cruise on Real Property, 5.

6 3 Greenleaf's Cruise on Real Property, 5.

7 2 Blackstone's Commentaries, 375; 4 Kent's Commentaries, 504.

8 See 4 Kent's Commentaries, 504; Osgood v. Breed, 12 Mass. 530; Cal. Civ. Code, sec. 1270 et seq.

9 Fetrow's Estate, 58 Pa. St. 427.

10 Rogers v. Farrar, 6 T. B. Mon. 424; and see Hall v. Martin, 46 N. H. 360. Compare sec. 342b, post.

**§ 326. Form of.**

The English statute of wills (32 Henry VIII, c. 1) only required that a devise of lands should be in writing, and it was not necessary to its validity that the writing should either be signed by the testator or attested by witnesses.<sup>1</sup> But by a provision in the statute of frauds (29 Charles II, c. 3, sec. 5), it was made necessary to the validity of a devise, not only that it should be in writing, but should also be signed by the party himself, or by some other in his presence and by his direction, and be attested and subscribed in his presence by three or four witnesses.<sup>2</sup> It is not sufficient that a devise be put into writing after the death of the devisor, being first declared by words only, for then it is but a nuncupative will.<sup>3</sup> But no precise form, as it respects the phraseology of the instrument, is requisite to constitute a valid devise, provided it sufficiently indicates the intention of the devisor to dispose of his lands after his decease.<sup>4</sup> Nor is it material in what language, or in what kind of handwriting or character, a devise is written;<sup>5</sup> and it is not essential that the parts of the will should be physically connected, if they are connected by their internal sense.<sup>6</sup> Writing on paper or parchment, and with pen and ink, is deemed most advisable;<sup>7</sup> though it seems that the material on which a will is written, and the kind of writing material, whether it be ink or pencil, are immaterial.<sup>8</sup>

The formalities required by statute in executing wills in the several states differ in unessential points, but in substance they agree, and the directions given by the English statute of frauds (29 Charles II) have generally been adopted.<sup>9</sup>

1 See 3 Greenleaf's Cruise on Real Property, 47, 48.

2 3 Greenleaf's Cruise on Real Property, 49; 4 Kent's Commentaries, 514. The number of witnesses has been reduced to two: Stat. 1 Vict., c. 26; Williams on Real Property, 168.

3 3 Greenleaf's Cruise on Real Property, 49.

4 See Wellborn v. Weaver, 17 Ga. 267, 63 Am. Dec. 235; Johnson v. Mitchell, 1 Humph. 172; Jones v. Nicolay, 2 Eng. L. & Eq. 591; Alexander v. Brame, 35 Eng. L. & Eq. 336; Brewer v. Baxter, 41 Ga. 212, 5 Am. Rep. 530; Barber v. Barber, 17 Hun, 72; Robinson v. Brewster, 140 Ill. 649, 33 Am. St. Rep. 265, and note; Scott's Estate, 147 Pa. St. 89, 30 Am. St. Rep. 713.

5 3 Greenleaf's Cruise on Real Property, 49; Masters v. Masters, 1 P. Wms. 425; Jackson v. Merrill, 6 Johns. 185, 5 Am. Dec. 213; Jackson v. Babcock, 12 Johns. 389; Caulfield v. Sullivan, 12 N. Y. Week. Dig. 442.

6 Martin v. Hamlin, 4 Strob. 188; Wikoff's Appeal, 15 Pa. St. 281, 53 Am. Dec. 597. Compare Tonnele v. Hall, 4 N. Y. 140; Lee v. Libb, 1 Show. 66; Goods of Horsford, L. R. 3 Pro. & D. 211; 12 Eng. Rep. 672.

7 See 3 Greenleaf's Cruise on Real Property, 49; Davis v. Shields, 26 Wend. 341.

8 See 2 Greenleaf on Evidence, sec. 691; In re Dyer, 1 Hagg. 219; Myers v. Vanderbelt, 84 Pa. St. 510, 24 Am. Rep. 227; Byers v. Hoppe, 61 Md. 207, 48 Am. Rep. 89; Cover v. Stem, 67 Md. 449, 1 Am. St. Rep. 406; Estate of Tomlinson, 133 Pa. St. 245, 19 Am. St. Rep. 637.

9 4 Kent's Commentaries, 513; Osgood v. Breed, 12 Mass. 530; Tonnele v. Hall, 4 N. Y. 140; Wall v. Wall, 123 Pa. St. 545, 10 Am. St. Rep. 549; Robinson v. Brewster, 140 Ill. 649, 33 Am. St. Rep. 265; Rigg v. Wilton, 13 Ill. 15, 54 Am. Dec. 419.

**§ 326a. Same—Continued.**

An olographic will is one that is entirely written, dated, and signed by the hand of the testator himself.<sup>1</sup> Formalities prescribed by law for the execution of such wills must be strictly observed. And it is held that if a will is written on a printed heading, so that in dating it the writer uses the figures printed on the paper as a part of his dating, it is not wholly written, dated, and signed by his hand, and therefore is not a valid olographic will.<sup>2</sup> So it has been held that nuncupative wills demand strictness of proof in all essential points, and, to be valid, must be executed by the testator while in extremis, as a matter of necessity and not of choice.<sup>3</sup> A contract to make a will may be enforced, and, if not performed, a recovery may be had for its violation.<sup>4</sup> Parties may agree between themselves to execute mutual and reciprocal wills, but in order to establish such an agreement and defeat the right to revoke a will, there must be full and satisfactory proof of the agreement, which cannot be supplied by presumptions.<sup>5</sup> A testamentary paper, in terms to take effect only on the happening of a certain contingency, cannot be admitted to probate as a will if the contingency does not happen.<sup>6</sup>

1 Cal. Civ. Code, sec. 1277.

2 Succession of Robertson, 49 La. Ann. 868, 62 Am. St. Rep. 672; Succession of Armant, 43 La. Ann. 310,



26 Am. St. Rep. 183. And so, to same effect, *Estate of Rand*, 61 Cal. 468, 44 Am. Rep. 555; *Estate of Billings*, 64 Cal. 427.

3 *Scaife v. Emmons*, 84 Ga. 619, 20 Am. St. Rep. 383; and see *Carroll v. Bonham*, 42 N. J. Eq. 625; *O'Neill v. Smith*, 33 Md. 569; *Reese v. Hawthorn*, 10 Gratt. 548; *Morgan v. Stevens*, 78 Ill. 287. But see *Harrington v. Stees*, 82 Ill. 50, 25 Am. Rep. 290, maintaining an opposite view.

4 *Huguley v. Lanier*, 86 Ga. 636, 22 Am. St. Rep. 487, and note; *Owens v. McNally*, 113 Cal. 444. Compare *Rose v. Oliver*, 32 Fla. 447; *Russell v. Agar*, 121 Cal. 396, 66 Am. St. Rep. 35, and note.

5 *Edson v. Parsons*, 155 N. Y. 555; *Gall v. Gall*, 29 Abb. N. C. 19.

6 *Morrow's Appeal*, 116 Pa. St. 440, 2 Am. St. Rep. 616.

### § 327. What Law Controls Execution of.

As it respects wills concerning lands, they must be executed according to the forms and solemnities prescribed by the laws of the place where the lands are situated.<sup>1</sup> So in the absence of statutory provisions to the contrary, the *lex rei sitae* controls as to the capacity or incapacity of the devisor, and the extent of his power to dispose of the property.<sup>2</sup> But by statutory provision in many of the states, a will executed according to the forms prescribed in the state where the testator resides will be admitted to probate in the state where the land is situated.<sup>3</sup> Formalities of execution are governed by the law existing at the time of execution, but the mode of proof by the law in force when the will is propounded for probate.<sup>4</sup> A statute affecting wills enacted after the

will is made, but before the testator's death, is held to take effect on the will.<sup>5</sup>

1 Kerr v. Moon, 9 Wheat. 565; United States v. Crosby, 7 Cranch, 115; Lynes v. Townsend, 33 N. Y. 558; White v. Howard, 52 Barb. 294; 46 N. Y. 144; Ford v. Ford, 70 Wis. 19, 5 Am. St. Rep. 117; Evansville Ice etc. Co. v. Winsor, 148 Ind. 682; Coppin v. Coppin, 2 P. Wms. 293; and see Doe v. Vardill, 5 Barn. & C. 438; Freke v. Lord Carbery, L. R. 16 Eq. 461; 6 Eng. Rep. 812.

2 Holmes v. Remsen, 4 Johns. Ch. 460, 8 Am. Dec. 581; 20 Johns. 229. 11 Am. Dec. 269; Clark v. Graham, 6 Wheat. 577; McCormick v. Sullivant, 10 Wheat. 192.

3 See O'Brien v. Woody, 4 McLean, 75; Nicholson v. Leavitt, 4 Sand. 252. Bayley v. Bailey, 5 Cush. 245; Glenn v. Thistle, 23 Miss. 42; Depas v. Mayo, 11 Mo. 314, 49 Am. Dec. 88.

4 Jauncey v. Thorne, 2 Barb. Ch. 40, 45 Am. Dec. 424; and see Lane's Appeal, 57 Conn. 182, 14 Am. St. Rep. 94; Packer v. Packer, 179 Pa. St. 580, 57 Am. St. Rep. 615.

5 Bishop v. Bishop, 4 Hill, 138; Sherman v. Sherman, 3 Barb. 385; Wakefield v. Phelps, 37 N. H. 295.

### § 328. Who may Make.

Generally speaking, all persons who have the power to dispose of their real estate by any conveyance inter vivos may dispose of the same by will.<sup>1</sup> Persons excluded by the statute of wills from devising lands are infants, married women, idiots, and persons of nonsane memory.<sup>2</sup> Under this statute, infants embrace all persons who have not yet attained the age of twenty-one years;<sup>3</sup> but in many of the states, females of the age of eighteen years are made competent by statute to devise lands.<sup>4</sup> So the disability of coverture has been in a great measure removed by statutory

enactments in the different states,<sup>5</sup> and a married woman may devise her real property in the same manner, and with the like effect, as if she were unmarried.<sup>6</sup> As it respects mental capacity in the testator, it is held to be sufficient if in making his will he understands what he is doing.<sup>7</sup> If then sane, it is immaterial that he was at the time under guardianship as an insane person.<sup>8</sup> Mere eccentricity is not enough to destroy testamentary capacity;<sup>9</sup> neither is extreme old age, nor the fact of being deaf and dumb.<sup>10</sup> And the will of a blind man was admitted to probate.<sup>11</sup> And it is said that every person who makes a will is presumed to be of sound understanding till the contrary is proved, and that the burden of proof lies on the other side.<sup>12</sup> But upon this point the authorities are conflicting;<sup>13</sup> and in some of them the rule is stated to be, that where a will is offered for probate, the burden of proof is on the person seeking such probate, to show that the testator was at the time of its execution of sound mind.<sup>14</sup> And if a deviser is under disability at the time when the devise is made, it is absolutely void, and the removal of the disability before the death of the deviser does not render it valid.<sup>15</sup> A joint tenant cannot devise any part of the subject matter of the tenancy, and is not authorized to do so by a statutory provision that any person may devise any interest descendible to his heirs which he may have in lands, tenements,

etc.<sup>16</sup> An instrument in writing, purporting to be the joint will of the two persons executing it as such, cannot be probated as the will of both if one of the parties be living.<sup>17</sup>

1 See sec. 274, ante; *Davis v. Calvert*, 5 Gill & J. 269, 25 Am. Dec. 282; *Rankin v. Rankin*, 6 T. B. Mon. 531, 17 Am. Dec. 161; 3 *Greenleaf's Cruise on Real Property*, 12.

2 See Stats. 34 & 35 Henry VIII, c. 5; 2 N. Y. Rev. Stats., sec. 1, p. 56; *Osgood v. Breed*, 12 Mass. 525; *West v. West*, 10 Serg. & R. 445; *Picquet v. Swan*, 4 Mason, 443; *Shaw's Will*, 2 Redf. 107.

3 3 *Greenleaf's Cruise on Real Property*, 12.

4 See *Allen v. Little*, 5 Ohio, 65.

5 See sec. 283, ante. At common law, a feme covert cannot make a will: *Adams v. Kellogg*, Kirby, 195, 1 Am. Dec. 18.

6 See *Waters v. Cullen*, 2 Bradf. 354; *Estate of Knox*, 131 Pa. St. 220, 17 Am. St. Rep. 798. In England a married woman possesses, under statute of 1 Victoria, chapter 26, no greater or different power to make a will than she possessed before that statute: *Willock v. Noble*, L. R. 7 H. L. 588; 13 Eng. Rep. 100.

7 *Kinne v. Kinne*, 9 Conn. 102, 21 Am. Dec. 732; *Comstock v. Hadlyme Ex. Soc.*, 8 Conn. 254, 20 Am. Dec. 100; *Converse v. Converse*, 21 Vt. 170, 52 Am. Dec. 58; *Kingsbury v. Whitaker*, 32 La. Ann. 1055, 36 Am. Rep. 278; *Pidcock v. Potter*, 68 Pa. St. 342, 8 Am. Rep. 181, 185, note. Compare *Cotton v. Ulnier*, 45 Ala. 378, 6 Am. Rep. 703; *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33; *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352; *Knox v. Knox*, 95 Ala. 495, 36 Am. St. Rep. 235; *Maddox v. Maddox*, 114 Mo. 35, 35 Am. St. Rep. 734; *Wade v. Holbrook*, 2 Redf. 378.

8 *Breed v. Pratt*, 18 Pick. 115; *Kingsbury v. Whitaker*, 32 La. Ann. 1055, 36 Am. Rep. 278; and see *Brooks v. Barrett*, 7 Pick. 94.

9 *Hartwell v. McMaster*, 4 Redf. 389; *Brick v. Brick*, 66 N. Y. 144; *Lee v. Lee*, 4 McCord, 183, 17 Am. Dec. 722. A belief in "spiritualism" does not incapacitate from making a valid will: *Brown v. Ward*, 53 Md. 376,

36 Am. Rep. 422; *In re Smith's Will*, 53 Md. 426; *Connor v. Stanley*, 72 Cal. 556, 1 Am. St. Rep. 84. See, also, *Bonard's Will*, 16 Abb. Pr. N. S., 128; *Lathrop v. American Board etc.*, 67 Barb. 590.

10 *Lowe v. Williamson*, 2 N. J. Eq. 82; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *Higdon's Will*, 6 J. J. Marsh. 444, 22 Am. Dec. 84; *Children's Aid Soc. v. Loveridge*, 70 N. Y. 387.

11 *Boyd v. Cook*, 3 Leigh, 32.

12 3 *Greenleaf's Cruise on Real Property*, 14; *Attorney General v. Parnter*, 3 Bro. C. C. 441; *Lee v. Lee*, 4 McCord, 183, 17 Am. Dec. 722; *Kaufman v. Caughman*, 49 S. C. 159, 61 Am. St. Rep. 808; and see *Chandler v. Ferris*, 1 Harr. (Del.) 461; *Pettes v. Bingham*, 10 N. H. 515; *Irish v. Newell*, 62 Ill. 196, 14 Am. Rep. 79.

13 See *Cramer v. Crumbaugh*, 3 Md. 491; *Crowninshield v. Crowninshield*, 2 Gray, 524; *Cilley v. Cilley*, 34 Me. 162; *Harrison v. Rowan*, 3 Wash. C. C. 582; *O'Donnell v. Rodiger*, 76 Ala. 222, 52 Am. Rep. 322.

14 *Crowninshield v. Crowninshield*, 2 Gray, 524; *Gerish v. Nason*, 22 Me. 440; *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352; and see *Comstock v. Hadlyme*, 8 Conn. 261, 20 Am. Dec. 100; *Wallis v. Hodgeson*, 2 Atk. 56; *Ware v. Ware*, 8 Me. 42.

15 *Arthur v. Bokenham*, 11 Mod. 157; *Brunker v. Cook*, 11 Mod. 123; *Girard v. City etc.*, 4 Rawle, 336, 26 Am. Dec. 145.

16 *Wilkins v. Young*, 144 Ind. 1, 55 Am. St. Rep. 162.

17 *In re Davis' Will*, 120 N. C. 9, 58 Am. St. Rep. 771; and see *Matter of Diez*, 50 N. Y. 94; *Betts v. Harper*, 39 Ohio St. 639, 48 Am. Rep. 477.

### § 328a. Testamentary Capacity—Continued.

It is held that the test of competency is only that the testator understood the business about which he was engaged when he had his will prepared and executed, knew the persons who were the natural objects of his bounty and understood his relation to them, and knew what property he

had and the disposition he desired to make of it.<sup>1</sup> Great age alone does not constitute testamentary incapacity if the testator had a mind and memory sufficient in essentials, and capable of acting rationally, and the will is in consonance with definite and long-settled intentions, is not unreasonable in its provisions, and has been executed with fairness.<sup>2</sup> But where monomania or insane delusion dictates the provisions of a will resulting in the disinheriting of the subjects of the delusion, whom the testator would otherwise remember in his will, it cannot stand.<sup>3</sup> The question is, whether or not the will is the offspring of the delusion.<sup>4</sup> Mental capacity to make a will, or what in any case shall be the standard of legal capacity, is a question of law.<sup>5</sup> A person of sound mind, even in extremis, may make a partial as well as a total disposition of his property by will.<sup>6</sup>

1 *Cash v. Lust*, 142 Mo. 630, 64 Am. St. Rep. 576; *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552; *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352; *Meeker v. Meeker*, 74 Iowa, 352, 7 Am. St. Rep. 489; *Waddington v. Buzby*, 45 N. J. Eq. 173, 14 Am. St. Rep. 706.

2 *Maverick v. Reynolds*, 2 Bradf. 360; *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352; *In re Cline's Will*, 24 Or. 175, 41 Am. St. Rep. 801; *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 85.

3 *Rivard v. Rivard*, 109 Mich. 98, 63 Am. St. Rep. 566; *Orchardson v. Cofield*, 171 Ill. 14, 63 Am. St. Rep. 211; and so, to same effect, *Haines v. Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566; *Thomas v. Carter*, 170 Pa. St. 272, 50 Am. St. Rep. 770.

4 *Taylor v. Trich*, 165 Pa. St. 586, 44 Am. St. Rep. 679.

5 *Kempsey v. McGinniss*, 21 Mich. 123; *May v. Bradlee*, 127 Mass. 414; *Hall v. Perry*, 87 Me. 569, 47 Am. St. Rep. 352.

6 *Henschel v. Maurer*, 69 Wis. 576, 2 Am. St. Rep. 757.

### § 329. Who may Take by.

All natural persons, including infants, *femes covert*, persons of nonsane memory, and aliens, may be devisees.<sup>1</sup> Though formerly doubted, it is now settled that posthumous children may be devisees.<sup>2</sup> A devise even to an illegitimate child in *ventre matris* is valid if the mother is sufficiently described;<sup>3</sup> or such child may take by particular description before its birth.<sup>4</sup> And natural children may take under the description of "children," if the will itself manifests an intent to include them in that term.<sup>5</sup> A wife may take by devise even from her husband, since the devise does not take effect till the death of the husband, by which the marriage is dissolved.<sup>6</sup> An alien may take by devise, and hold against all but the state until office found.<sup>7</sup> In New York a resident alien devisee of a citizen takes, upon acceptance of the devise, a conditional title, absolute as against the heirs of the testator, but defeasible by the state until he complies with the conditions as to aliens.<sup>8</sup> Corporations are expressly disabled by the statute 34 & 35 Henry VIII, chapter 5, section 14, from taking by devise.<sup>9</sup> In this

country, corporations are competent to take by devise unless expressly disqualified by statute;<sup>10</sup> and they may take under the words "person or persons," and the like.<sup>11</sup> A devise to a person uncertain, as for instance, to such of the daughters of A as shall marry a person of the name of B, is good.<sup>12</sup> By the rule of the common law, a devise to the heir of the precise estate which he would take by descent, if the particular devise to him was omitted from the will, is void, and he takes by descent, which is the better title.<sup>13</sup> But this rule has been changed by statute in England.<sup>14</sup> A devise to a corporation to be created after the death of the testator will be upheld, if the corporation is called into being within the time allowed for the vesting of future estates.<sup>15</sup> And it is held that the capacity of a corporation to take by devise in excess of the amount prescribed by law cannot be questioned by the heirs or next of kin of the testator.<sup>16</sup>

1 4 Kent's Commentaries, 506; and see *Hall v. Hancock*, 15 Pick. 255, 26 Am. Dec. 598; *Mitchell v. Blair*, 5 Paige, 588.

2 *Hone v. Van Schaick*, 3 Barb. Ch. 488; *Watkins v. Flora*, 8 Ired. 374.

3 *Pratt v. Flamer*, 5 Har. & J. 10. Compare *Earl v. Wilson*, 17 Ves. 528; *Methuen v. Devon*, 1 P. Wms. 529; *Gardner v. Hyer*, 2 Paige, 11.

4 *Gordon v. Gordon*, 1 Meriv. 141; *Evans v. Massey*, 8 Price, 22.

5 *Wilkinson v. Adam*, 12 Price, 470; *Doe v. Clarke*, 2 H. Black. 399. Compare *Gardner v. Hyer*, 2 Paige, 11;



visé of the rent of land without any qualification or limitation as to time operates as a devise of the land: *Jennings v. Conboy*, 73 N. Y. 230; and see *Carpenter v. Van Olinder*, 127 Ill. 42, 11 Am. St. Rep. 92.

2 *Cowper v. Frankline*, 3 Bulst. 184; *Steel v. Cook*, 1 Met. 281.

3 *Jones v. Roe*, 3 Term Rep. 88; *Pond v. Bergh*, 10 Paige. 149; *Kean v. Roe*, 2 Harr. (Del.) 112, 29 Am. Dec. 336; *Den v. Manners*, 1 Spenc. 142; and see *Deas v. Horry*, 2 Hill (S. C.), 248.

4 *Jackson v. Varick*, 7 Cow. 238; 2 Wend. 166, 19 Am. Dec. 571; *Brigham v. Shattuck*, 10 Pick. 306; *Kean v. Roe*, 2 Harr. (Del.) 112, 29 Am. Dec. 336; *Watts v. Cole*, 2 Leigh, 664; 2 N. Y. Rev. Stats., sec. 2, p. 57. Compare *Goodright v. Forester*, 8 East, 552. A trust estate will pass under a general clause in a will relating to the realty, unless the intention of the testator appear from the will to be otherwise: *Jackson v. Delancy*, 13 Johns. 536, 7 Am. Dec. 403.

5 *Bunter v. Coke*, 1 Salk. 237; *Pistol v. Riccardson*, 3 Doug. 361; *Langford v. Pitt*, 2 P. Wms. 629; *Johnson v. Hunly*, Tayl. 305, 1 Am. Dec. 590; *Meador v. Sorsby*, 2 Ala. 712, 36 Am. Dec. 432.

6 *M'Kinnon v. Thompson*, 3 Johns. Ch. 307; *Minuse v. Cox*, 5 Johns. Ch. 441, 9 Am. Dec. 313; *Brewster v. McCall*, 15 Conn. 274; *Foster v. Craige*, 3 Ired. 536; *Carter v. Thomas*, 4 Me. 341; *Blaisdell v. Hight*, 69 Me. 306, 31 Am. Rep. 278. But see *Whittemore v. Bean*, 6 N. H. 47.

7 See 4 Kent's Commentaries, 512; *Parker v. Bogardus*, 5 N. Y. 309; *Ellison v. Miller*, 11 Barb. 332; *Lent v. Lent*, 24 Hun, 436; *Wynne v. Wynne*, 23 Miss. 251; *Mullock v. Souder*, 5 Watts & S. 198; *Raines v. Barker*, 13 Gratt. 128; *Winchester v. Forster*, 3 Cush. 366; *Cushing v. Aylwin*, 12 Met. 169; *Blaisdell v. Hight*, 69 Me. 306, 31 Am. Rep. 278.

8 *Carroll v. Carroll*, 16 How. 275; *Kent v. McPherson*, 7 Har. & J. 320. Subsequently acquired lands at another place do not pass under a devise of all lands of the testator: *Blaisdell v. Hight*, 69 Me. 306, 31 Am. Rep. 278.

9 Stat. 1 Vict., c. 26, sec. 24.

10 *Hazelett v. Farthing*, 94 Ky. 421, 42 Am. St. Rep. 365; and see *Hatch's Estate*, 62 Vt. 300, 22 Am. St. Rep. 109.

11 *Garrison v. Hill*, 79 Md. 75, 47 Am. St. Rep. 363.

### § 331. What Terms in Pass a Fee.

Those technical words which in a deed are absolutely necessary to the creation of particular estates are not required in a devise.<sup>1</sup> Thus, the word "heirs" need not be used in a will in order to create an estate in fee, but any other words or expressions which show an intent on the part of the testator to give an absolute estate will have the same effect.<sup>2</sup> The intention of the testator, as collected from the whole will, is to govern, unless it is otherwise provided by law.<sup>3</sup> A devise to a person generally, or indefinitely, with a power of disposition, carries a fee;<sup>4</sup> but it is otherwise where an estate for life only is devised by certain and express words, with a power of disposition of the reversion annexed.<sup>5</sup> In a will, the words "all my estate," or "my whole estate," carry a fee;<sup>6</sup> so of the words "all my real property"; or "all my landed property";<sup>7</sup> or "all the rest and residue of my real and personal estate";<sup>8</sup> or "all my goods and effects, both real and personal";<sup>9</sup> or "I give my lands";<sup>10</sup> or the word "property."<sup>11</sup> or "leasehold," where the intent is clear;<sup>12</sup> or the word "remainder," or "reversion," after a disposition of a particular estate.<sup>13</sup> So a devise of all a person's "right, title, and interest" in a

house will pass a fee.<sup>14</sup> A devise charged with the payment of debts and legacies passes a fee simple.<sup>15</sup> So if a person devises land, with a direction that the devisee shall pay a gross sum out of it, the latter will take an estate in fee simple.<sup>16</sup> A devise of wild lands in Maine and Massachusetts passes a fee.<sup>17</sup> A devise to trustees in fee, "for the use and benefit of A B," without words of limitation, was held to pass the whole beneficial interest, or fee simple, to A B.<sup>18</sup> And generally, if the trust is one requiring the trustee to take a fee it will be so construed.<sup>19</sup> A devise of lands to a trustee, authorizing him to sell without accounting, or to dispose of the lands by will, or otherwise, vests an absolute estate in the trustee.<sup>20</sup>

1 See sec. 16, ante; *Jenkins v. Clement*, 1 Harp. Eq. 72, 14 Am. Dec. 698; *Peyton v. Smith*, 4 McCord, 476, 17 Am. Dec. 758.

2 Sec. 16, ante; *Fox v. Phelps*, 17 Wend. 393; *Olmstead v. Harvey*, 1 Barb. 102; *Franklin v. Harter*, 7 Blackf. 488; *Baker v. Briggs*, 12 Pick. 27; *Morrison v. Semple*, 6 Binn. 97; *Hammond v. Hammond*, 8 Gill & J. 437; *Melick v. Pidcock*, 44 N. J. Eq. 525, 6 Am. St. Rep. 901; *Doty v. Teller*, 54 N. J. L. 163, 33 Am. St. Rep. 670. In the United States, a devise, without words of limitation, conveys all the estate and interest which the testator had in the premises, unless a different intent should be clear from the will itself: See sec. 16, ante; *Fay v. Fay*, 1 Cush. 93; *Jackson v. Bull*, 10 Johns. 148, 6 Am. Dec. 321; *Reeder v. Spearman*, 6 Rich. Eq. 88; *Siddons v. Cockrell*, 131 Ill. 653. So, by statute in England (1 Vict., c. 26), a general devise, without words of limitation, passes the testator's whole interest in the premises devised.

3 Morrison v. Semple, 6 Binn. 97; Deering v. Adams, 37 Me. 264; Saunders v. Mathewson, 11 Conn. 149; Pratt v. Leadbetter, 38 Me. 9.

4 Jackson v. Robins, 16 Johns. 588; Benesch v. Clark, 49 Md. 497; Muhlke v. Tiedemann, 177 Ill. 606; Combs v. Combs, 67 Md. 11, 1 Am. St. Rep. 359; Bradley v. Carnes, 94 Tenn. 27, 45 Am. St. Rep. 696; Mitchell v. Moese, 77 Me. 423, 52 Am. Rep. 781.

5 Jackson v. Robins, 16 Johns. 588; Stevens v. Winship, 1 Pick. 318, 11 Am. Dec. 178; Moore v. Webb, 2 B. Mon. 283; Flintham's Case, 11 Serg. & R. 16; Cook v. Walker, 15 Ga. 457.

6 Johnson v. Kerman, 1 Rolle Abr. 834; Randall v. Tuchin, 6 Taunt. 410; Doe v. Williams, 1 Ex. 414; Jackson v. Merrill, 6 Johns. 185, 5 Am. Dec. 213; Shinn v. Holmes, 25 Pa. St. 142; Leland v. Adams, 9 Gray, 71; Hammond v. Hammond, 8 Gill & J. 437; Briggs v. Shaw, 9 Allen, 517. Compare Hart v. White, 26 Vt. 260.

7 3 Greenleaf's Cruise on Real Property, 277; Foster v. Stewart, 18 Pa. St. 23; Fogg v. Clark, 1 N. H. 163; and see Sharp v. Sharp, 6 Bing. 630; Nicholls v. Butcher, 18 Ves. 193.

8 Davenport v. Coltman, 9 Mees. & W. 481; Farmer v. Francis, 2 Sim. & St. 505; McConnel v. Smith, 23 Ill. 611; Donovan v. Donovan, 4 Harr. (Del.) 177; Parker v. Parker, 5 Met. 134. Compare Doe v. Hurrell, 5 Barn. & Ald. 18.

9 Ferguson v. Zepp, 4 Wash. 645; and see Tanner v. Wise, 3 P. Wms. 295.

10 Smith v. Berry, 8 Ohio, 365. Compare Wright v. Denn, 10 Wheat. 204.

11 See Mayo v. Carrington, 4 Call, 472; Wilce v. Wilce, 7 Bing. 664; Billings v. Billings, 5 Sim. 232; Jackson v. Housel, 17 Johns. 281.

12 Saylor v. Kocher, 3 Watts & S. 163.

13 3 Greenleaf's Cruise on Real Property, 281; Cruger v. Hayward, 2 Desaus. 422; Annable v. Patch, 3 Pick. 360; and see Doe v. Lean, 1 Ad. & E., N. S., 229; Lippen v. Eldred, 2 Barb. 130; Carpenter v. Van Olinder, 127 Ill. 42, 11 Am. St. Rep. 92; Bowen v. Bowen, 87 Va. 438, 24 Am. St. Rep. 664. But see Peiton v. Banks, 1 Vern. 65.

14 *Cole v. Rawlinson*, 3 Brown P. C. 7; and see *Merrit v. Abendroth*, 24 Hun, 218.

15 *Doe v. Richards*, 3 Term Rep. 356; *Ackland v. Ackland*, 3 Vern. 687; *Doe v. Phillips*, 3 Barn. & Adol. 753; *Bell v. Scammon*, 15 N. H. 381; *Spraker v. Van Alstyne*, 18 Wend. 200. See *Coone v. Parmentier*, 10 Pa. St. 72; *Olmstead v. Olmstead*, 4 N. Y. 56; *Lithgow v. Kavenagh*, 9 Mass. 161; *Jackson v. Harris*, 8 Johns. 141.

16 *Doe v. Fyldes*, Cowp. 841; *Collier's Case*, 6 Rep. 16; *Willis v. Bucher*, 2 Binn. 455.

17 *Russell v. Elden*, 15 Me. 193; *Sargent v. Towne*, 10 Mass. 303; and see *Holmes v. Pattison*, 25 Pa. St. 484.

18 3 *Greenleaf's Cruise on Real Property*, 268; *Bass v. Scott*, 2 Leigh, 356; and see *Knight v. Selby*, 3 Man. & G. 92; *Doe v. Davies*, 1 Ad. & E., N. S., 430.

19 *Gibson v. Montfort*, 1 Ves. 485; *Inman v. Jackson*, 4 Me. 237; *Pearce v. Savage*, 45 Me. 90; *Poad v. Watson*, 37 Eng. L. & Eq. 112.

20 *Bank of Charleston v. Dowling*, 52 S. C. 345.

### § 331a. What Words Vest Life Estate.

A devise by husband to wife for life, remainder over to children, with power to sell if thought advisable, gives to the wife only a life estate.<sup>1</sup> Under a devise to A for life, and after his decease to his lawful issue absolutely and in fee, but if A should die without lawful issue at the time of his death, then to B, A takes a life estate, with limitation over to his issue in fee as purchasers.<sup>2</sup>

A life estate may be created by will with power to dispose of the fee, and limit the remainder after the termination of the life estate.<sup>3</sup> But the general rule is, that where a power of disposal accompanies a devise of a life estate, the power of disposal is only coextensive with the estate which the devisee takes under the will, and means such

disposal as a tenant for life could make, unless the will contains words indicating that a larger power was intended.<sup>4</sup>

1 *Whittemore v. Russell*, 80 Me. 297, 6 Am. St. Rep. 200; and so, to same effect in this class of cases, see *Taylor v. Bell*, 158 Pa. St. 651, 38 Am. St. Rep. 857; *Kent v. Morrison*, 153 Mass. 137, 25 Am. St. Rep. 616; *Wilson v. O'Connell*, 147 Mass. 17; *Koenig v. Kraft*, 87 Ky. 95, 12 Am. St. Rep. 463; *Doty v. Teller*, 54 N. J. L. 163, 33 Am. St. Rep. 670; *Green v. Hewitt*, 97 Ill. 113, 37 Am. Rep. 102; *Long v. Paul*, 127 Pa. St. 456, 14 Am. St. Rep. 862. Compare *Larsen v. Johnson*, 78 Wis. 300, 23 Am. St. Rep. 404; *Patrick v. Morehead*, 85 N. C. 62, 39 Am. Rep. 684; *Simms v. Buist*, 52 S. C. 554.

2 *Boykin v. Ancrum*, 28 S. C. 486, 13 Am. St. Rep. 698.

3 *Boykin v. Ancrum*, 28 S. C. 486, 13 Am. St. Rep. 698; *Kaufman v. Breckinridge*, 117 Ill. 313; *Skinner v. McDowell*, 169 Ill. 365, 61 Am. St. Rep. 183.

4 *In re Estate of Cashman*, 134 Ill. 88; and so, to same effect, *Mansfield v. Shelton*, 67 Conn. 390, 52 Am. St. Rep. 285, and note. Compare sec. 331, ante; *Yost v. McKee*, 179 Pa. St. 381, 57 Am. St. Rep. 604; *White v. Crenshaw*, 5 Mackey, 113, 60 Am. Rep. 370.

### § 331b. Execution of Will, Requisites.

The right to make testamentary disposition of property rests wholly upon the legislative will, and is derived entirely from the statutes. And it is held that the omission of any of the statutory requirements for the execution of a will is fatal to its operation as such.<sup>1</sup> Statutory requisites in executing a will must be substantially complied with to render the will valid.<sup>2</sup>

1 *In re O'Neil*, 91 N. Y. 520; *In re Walker*, 110 Cal. 387, 52 Am. St. Rep. 104; *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265.

2 *Chaffee v. Missionary Convention*, 10 Paige, 85, 40 Am. Dec. 225; *Wall v. Wall*, 123 Pa. St. 545, 10 Am. St. Rep. 549.

### § 332. Signing Will.

It is essential to the validity of a devise of lands that it be signed by the testator, or by some other person in his presence and by his direction.<sup>1</sup> It is, however, a sufficient signing if the testator makes his mark, although he may be able to write.<sup>2</sup> And his signature, though imperfectly and indistinctly written, may be regarded as his mark, and thus satisfy the statute.<sup>3</sup> Under the English statute of frauds, if the testator's name be written by himself in any part of a will, it is deemed a sufficient signing.<sup>4</sup> But this rule has been changed by a recent statute in England, which requires a will devising land to be signed "at the foot or end thereof."<sup>5</sup> And the same alteration has been made by statute in some of the states.<sup>6</sup> The words "at the foot or end thereof" are to be construed strictly, and wills have frequently been rejected for lack of compliance with the statute in this respect.<sup>7</sup> A seal is not necessary to the validity of a will,<sup>8</sup> and sealing a will is not of itself a sufficient signing.<sup>9</sup> Subscription by testator after the attestation clause is "at the end of the will," and valid.<sup>10</sup> So testator's signature to his will by initials only may be a valid execution thereof, provided an intent to execute is apparent.<sup>11</sup> And although the testator's hand

be guided in writing his signature or making his mark, it is sufficient if it was his purpose to sign, and he used his best physical effort to participate in the act.<sup>12</sup> And signing by the mark of the testator is sufficient, though the Christian name signed with the mark and intended for his was incorrectly written as James, while his name was Samuel.<sup>13</sup>

1 See sec. 326, ante; *Stricker v. Groves*, 5 Whart. 386; *Haynes v. Haynes*, 23 Ohio St. 598, 31 Am. Rep. 579; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875; *Steele v. Helm*, 2 Marvel (Del.), 237.

2 *Harrison v. Elvin*, 3 Ad. & E., N. S., 117; *Addy v. Grix*, 8 Ves. 504; *Keeney v. Whitmarsh*, 16 Barb. 141; *Shinkle v. Crock*, 17 Pa. St. 159; *Ray v. Hill*, 3 Strob. 297; *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265.

3 *Hartwell v. McMaster*, 4 Redf. 389.

4 *Lemayne v. Stanley*, 3 Lev. 1; *Morrison v. Turnour*, 18 Ves. 183; *Jackson v. Van Dusen*, 5 Johns. 144, 4 Am. Dec. 330; *Miles' Will*, 4 Dana, 1; and see *Waller v. Waller*, 1 Gratt. 454, 42 Am. Dec. 564.

5 Stats. 7 Wm. IV, and 1 Vict., c. 26, sec. 9; and explanatory Stat. 15 Vict., c. 24.

6 See 2 N. Y. Rev. Stats., sec. 40, p. 63; *Remsen v. Brinckerhoff*, 26 Wend. 331; *Sisters of Charity v. Kelly*, 67 N. Y. 409; *Tonnele v. Hall*, 4 N. Y. 140; *Barr v. Graybill*, 13 Pa. St. 396; *Winsland's Appeal*, 118 Pa. St. 37, 4 Am. St. Rep. 571; *Matter of Booth*, 127 N. Y. 109, 24 Am. St. Rep. 429; *Matter of Whitney*, 153 N. Y. 259, 60 Am. St. Rep. 616.

7 *Ayres v. Ayres*, 1 Rob. Ecc. 421. See Stat. 15 Vict., c. 24. Compare *Sisters of Charity v. Kelly*, 67 N. Y. 409.

8 *Avery v. Pixley*, 4 Mass. 462.

9 *Smith v. Evans*, 1 Wils. 313; *Wright v. Wakeford*, 17 Ves. 459. But compare *Lemayne v. Stanley*, 3 Lev. 1; *Lee v. Libb*, 1 Show. 69.



- 10 *Younger v. Duffie*, 94 N. Y. 535, 46 Am. Rep. 156.
- 11 *Plate's Estate*, 148 Pa. St. 55, 33 Am. St. Rep. 805.
- 12 *Fritz v. Turner*, 46 N. J. Eq. 515; and see *Diehl v. Rodgers*, 169 Pa. St. 316, 47 Am. St. Rep. 908.
- 13 *Rook v. Wilson*, 142 Ind. 24, 51 Am. St. Rep. 163.

### § 333. Attestation.

The statute of frauds (29 Charles II, c. 8, sec. 5) requires a devise to be attested and subscribed in the presence of a testator by three or four witnesses.<sup>1</sup> In England the number of witnesses has been reduced to two;<sup>2</sup> and this number is all that is required by statute in some of the states.<sup>3</sup> In Pennsylvania, it is sufficient if the execution of the will be proved by two witnesses, and it need not be attested by their signatures.<sup>4</sup> Attestation by a witness making his mark,<sup>5</sup> or by signing only the initials of his name, has been held sufficient.<sup>6</sup> So if the witness adopts his signature already on the instrument, without subscribing it again, the attestation is held to be sufficient.<sup>7</sup> One who signs his name as witness to a will should be satisfied that the testator is of sound and disposing mind.<sup>8</sup> The act of attestation implies a knowledge of the existence of those facts which constitute the legal execution of the instrument as a valid will;<sup>9</sup> and it is only with the most scrupulous jealousy that the testimony of a subscribing witness will afterward be admitted to impeach his own act.<sup>10</sup> If the testator acknowledges his signature before the witnesses,

it is sufficient, although they do not see him sign his name.<sup>11</sup> So if the testator and witnesses are in the same room, the attestation will be presumed to have been in the presence of the former;<sup>12</sup> and it is not necessary that the fact of the signing in the presence of the testator should appear in the attestation itself.<sup>13</sup> It is not necessary that the witnesses should attest in the presence of each other;<sup>14</sup> and it is held to be immaterial in this country whether they subscribe their names before or after the testator has signed the will.<sup>15</sup> But under the English statute (1 Vict., c. 26, sec. 9), they must subscribe after the testator has signed.<sup>16</sup> The witnesses to a will must be credible<sup>17</sup> and competent witnesses at the time of attestation.<sup>18</sup> If then competent, no subsequent incompetency will have the effect to invalidate the will, and it may be established by secondary evidence.<sup>19</sup>

1 Sec. 319, ante; *Ragland v. Huntingdon*, 1 Ired. 561; *Dewey v. Dewey*, 1 Met. 349, 35 Am. Dec. 367; *Harmon v. Clark*, 13 Gray 114.

2 By Stat. 1 Vict., c. 26.

3 See 2 N. Y. Rev. Stats., sec. 40, p. 63; *Remsen v. Brinckerhoff*, 26 Wend. 331; 8 Paige, 488.

4 *Rohner v. Stehman*, 1 Watts, 442; *Stricker v. Groves*, 5 Whart. 386.

5 *Harrison v. Harrison*, 8 Ves. 185; *Baker v. Denning*, 8 Ad. & E. 94; *Garrett v. Heflin*, 98 Ala. 615, 39 Am. St. Rep. 89; *McFarland v. Bush*, 94 Tenn. 538; 45 Am. St. Rep. 760; *Adams v. Chaplin*, 1 Hill Ch. 266; *Madison v. Zabriskie*, 11 La. 251; *Den v. Mitton*, 12 N. J. L. 70; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875.

6 Jackson v. Van Dusen, 5 Johns. 144.

7 Pollock v. Glassell, 2 Gratt. 439. See Smythe v. Irick, 46 S. C. 299, 57 Am. St. Rep. 684, and note.

8 Scribner v. Crane, 2 Paige, 147; Sears v. Dillingham, 12 Mass. 358; Doe v. Pattison, 2 Blackf. 355; Withinton v. Withinton, 7 Mo. 589.

9 Swift v. Wiley, 1 B. Mon. 117; and see Chase v. Lincoln, 3 Mass. 236.

10 Bootle v. Blundell, 19 Ves. 504; Burrows v. Locke, 10 Ves. 474; Goodtitle v. Clayton, 4 Burr. 2225; Walton v. Shelley, 1 Term Rep. 300.

11 Stonehouse v. Evelyn, 3 P. Wms. 253; Grayson v. Atkinson, 2 Ves. 254; Loy v. Kennedy, 1 Watts & S. 396; Adams v. Field, 21 Vt. 256; Tilden v. Tilden, 13 Gray, 103; Rosser v. Franklin, 6 Gratt. 1; Wright v. Wright, 7 Bing. 457; Simmons v. Leonard, 91 Tenn. 183, 30 Am. St. Rep. 875; Mitchell v. Mitchell, 16 Hun, 97; 77 N. Y. 596.

12 Neil v. Neil, 1 Leigh, 6, 10; Edelin v. Hardey, 7 Har. & J. 61; Lyon v. Smith, 11 Barb. 104; White v. Trustees etc., 6 Bing. 310. Compare Mendell v. Dunbar, 169 Mass. 74, 61 Am. St. Rep. 277; Witt v. Gardiner, 158 Ill. 176, 49 Am. St. Rep. 150.

13 Croft v. Pawlet, 2 Strange, 1109; Brice v. Smith, Willes, 1.

14 Bond v. Sewell, 3 Burr. 1773; Westbeeck v. Kennedy, 1 Ves. & B. 362.

15 Pollock v. Glassell, 2 Gratt. 439; Swift v. Wiley, 1 B. Mon. 117; Kaufman v. Caughman, 49 S. C. 159, 61 Am. St. Rep. 808.

16 In re Byrd, 3 Curt. 117. See Phipps v. Hale, L. R. 3 Pro. & D. 166; 10 Eng. Rep. 521. Under this statute the marriage, after attestation of a will of a devisee to the attesting witness, does not affect the validity of the devise: Thorpe v. Bestwick, L. R. 6 Q. B. Div. 311; 29 Eng. Rep. 643.

17 See Curtiss v. Strong, 4 Day, 51; Amory v. Fellowes, 5 Mass. 219; Orndorff v. Hammer, 12 B. Mon. 619.

18 Bacon v. Bacon, 17 Pick. 134; Hans v. Palmer, 21 Pa. St. 296; Fenwick v. Forest, 6 Har. & J. 415; Workman v. Dominick, 2 Strob. 589; Burritt v. Silli-

man, 16 Barb. 198; *Camp v. Stark*, 10 Phila. 528; *Henderson v. Kenner*, 1 Rich. 474. A wife is not a competent witness to her husband's will: *Pease v. Allis*, 110 Mass. 157. 14 Am. Rep. 591; nor is she a competent witness to a will containing a devise to her husband: *Sullivan v. Sullivan*, 106 Mass. 474, 8 Am. Rep. 356.

19 *Sears v. Dillingham*, 12 Mass. 358; *Jones v. Scott*, 2 Ala. 58; *Austey v. Dowsing*, 2 Strange, 1253; *In re Holt's Will*, 56 Minn. 33, 45 Am. St. Rep. 434; *Gillis v. Gillis*, 96 Ga. 1, 51 Am. St. Rep. 121; and see *Rugg v. Rugg*, 83 N. Y. 592; *Cheatham v. Hatcher*, 30 Gratt. 56, 32 Am. Rep. 650; *Will of Meurer*, 44 Wis. 393, 28 Am. Rep. 591.

### § 333a. Same—Continued.

It is not essential that the testator sign his name in the presence of the subscribing witnesses, nor that they actually see his signature at all. It is sufficient that the will be produced, signed by the testator, and in such a way that this signature may be seen by the witnesses, and that he request them to witness it as his will.<sup>1</sup> Nor is it essential that the witnesses subscribe any formal clause of attestation;<sup>2</sup> their signatures in the proper and usual place, but without any attestation clause, is sufficient.<sup>3</sup> It is maintained in some jurisdictions that witnesses to a will must subscribe their names in the presence of the testator.<sup>4</sup> But where the signing by the witnesses was in such a place that the testator might have seen them doing it if he had chosen, and was not prevented therefrom by physical inability, it was held to be a signing "in his presence."<sup>5</sup> So an attestation clause, reciting that the witness signed in the presence of the testator, raises a strong presumption of that fact,

which can be overcome only by clear and satisfactory proof to the contrary.<sup>6</sup> It is not necessary that the subscribing witnesses should attest the will in the presence of each other.<sup>7</sup> And it is held that circumstances may supply the want of one witness to a will, provided they go directly to the immediate act of disposition.<sup>8</sup>

1 *Tilden v. Tilden*, 13 Gray, 110; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875; *Stephens v. Stephens*, 129 Mo. 422, 50 Am. St. Rep. 454; *Hobart v. Hobart*, 154 Ill. 610, 45 Am. St. Rep. 151. But see contra, *Matter of Mackay*, 110 N. Y. 611, 6 Am. St. Rep. 409; *Hitchler's Will*, 55 N. Y. Supp. 642.

2 *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265.

3 *Ela v. Edwards*, 16 Gray, 91; *Berberet v. Berberet*, 131 Mo. 399, 52 Am. St. Rep. 634.

4 See, as to Rhode Island, *Pawtucket v. Ballou*, 15 R. I. 58, 2 Am. St. Rep. 868; Illinois: *Witt v. Gardiner*, 158 Ill. 176, 49 Am. St. Rep. 150; *Drury v. Connell*, 177 Ill. 43.

5 *Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276, and note; and so, to same effect, *Riggs v. Riggs*, 135 Mass. 238, 46 Am. Rep. 464.

6 *Will of O'Hagan*, 73 Wis. 78, 9 Am. St. Rep. 763; and see *Waddington v. Buzby*, 45 N. J. Eq. 173, 14 Am. St. Rep. 706.

7 *Johnson v. Johnson*, 106 Ind. 475, 55 Am. Rep. 762; *Simmons v. Leonard*, 91 Tenn. 183, 30 Am. St. Rep. 875; *Steele v. Helm*, 2 Marvel (Del.), 237.

8 *Scott's Estate*, 147 Pa. St. 89, 30 Am. St. Rep. 713; and see *Cowles v. Reavis*, 109 N. C. 417. But compare *Simrell's Estate*, 154 Pa. St. 604, 35 Am. St. Rep. 864.

### § 334. Publication of Will.

By the publication of a devise is meant some act on the part of the devisor which shows that he intended the instrument to operate as a will or

devise.<sup>1</sup> And it has been said that publication is an essential part of the execution of the devise, and not a mere matter of form.<sup>2</sup> But no precise form of words is requisite,<sup>3</sup> and publication may be inferred from circumstances.<sup>4</sup> And the opinion has been expressed that a will is good without publication, unless it is expressly required by statute, or by the power under which the will is made.<sup>5</sup> The execution of the instrument, in the manner prescribed by law, accompanied by the testamentary declaration prescribed, and the attestation of the witnesses, are in truth a publication in the sense in which that term is usually understood.<sup>6</sup> A distinct publication of the will is, however, required by statute in some of the states as, for instance, in New York;<sup>7</sup> and although no particular form of expression is required, yet the witnesses must know that it is the testator's will, and that he understood it to be so, and intended to execute it as such.<sup>8</sup> But any communication to the witnesses, either by word or deed, or both, which renders it certain that he intends the instrument which he executes to take validity and effect as a last will and testament, will satisfy the requirement of the statute.<sup>9</sup> And it is held that publication may be established on the evidence of one attesting witness in opposition to that of the other.<sup>10</sup> A testator must know the contents of his will, but it is not necessary to prove that it was read over or

explained to him at the time it was executed, if he could both read and write.<sup>11</sup> His knowledge of the contents of the will may be shown by circumstances.<sup>12</sup>

1 3 Greenleaf's Cruise on Real Property, 70, 71.

2 Ross v. Ever, 3 Atk. 161. See Remsen v. Brinckerhoff, 26 Wend. 325, 37 Am. Dec. 251. Ordinarily, the time of publication of a will is referred to its date: Bagwell v. Elliott, 2 Rand. 190.

3 Trimmer v. Jackson, 4 Burns Ec. L. 119; Warren v. Postlethwaite, 2 Coll. C. C. 108; Reese v. Crosby, 3 Redf. 74; Burk's Will, 2 Redf. 239.

4 Wallis v. Wallis, 4 Burns Ec. L. 114; Ward v. Swift, 1 Crompt. & M. 175.

5 Moodie v. Reid, 7 Taunt. 355; and see Osborn v. Cook, 11 Cush. 532, 59 Am. Dec. 155; Watson v. Pipes, 32 Miss. 451; Dean v. Dean, 27 Vt. 746.

6 Doe v. Purdett, 4 Ad. & E. 14; Curtels v. Kenrick, 3 Mees. & W. 461; Allen v. Everett, 12 B. Mon. 371; Smith v. Dolby, 4 Harr. (Del.) 350; Small v. Small, 4 Me. 220, 16 Am. Dec. 253.

7 2 N. Y. Rev. Stats., sec. 40, p. 63; Remsen v. Brinckerhoff, 26 Wend. 331; 8 Paige, 488; Lewis v. Lewis, 11 N. Y. 220. See, also, Rogers v. Diamond, 13 Ark. 474; Den v. Mitton, 12 N. J. L. 70.

8 Brown v. De Selding, 4 Sand. 10; Tyler v. Mapes, 19 Barb. 448; Seymour v. Van Wyck, 6 N. Y. 120; Lane v. Lane, 95 N. Y. 494; Matter of Hunt, 110 N. Y. 278.

9 Darling v. Arthur, 22 Hun, 84; Van Hoffman v. Ward, 4 Redf. 244.

10 Johnston v. Hatfield, 12 N. Y. Week. Dig. 393. And see White v. British Museum, 6 Bing. 310. Compare Robinson v. Brewster, 140 Ill. 649, 33 Am. St. Rep. 265; Sharp v. Hall, 86 Ala. 110, 11 Am. St. Rep. 28.

11 Garrett v. Heflin, 98 Ala. 615, 39 Am. St. Rep. 89, and note. See O'Brien v. Spalding, 102 Ga. 490, 66 Am. St. Rep. 202.

12 Montague v. Allen, 78 Va. 592, 49 Am. Rep. 384.

**§ 335. Revocation of Will.**

A will does not take effect till after the testator's death,<sup>1</sup> and is, therefore, revocable at any time during his life.<sup>2</sup> Although a person should declare his will to be irrevocable, yet he may revoke it.<sup>3</sup> But the same capacity is required to revoke as to make a will;<sup>4</sup> and an act of revocation when the testator was non compos is a nullity.<sup>5</sup> Under the provisions of the statute of frauds, a will may be expressly revoked by a subsequent will, by a codicil duly attested according to the statute, by a writing declaring the testator's intention to revoke his will, or by burning, canceling, tearing, or obliterating the will.<sup>6</sup> A will may also be revoked by implication of law.<sup>7</sup> It is the intention of the testator to revoke his will which constitutes the revocation;<sup>8</sup> and no act of his will amount to a revocation unless it be done *animo revocandi*.<sup>9</sup> A former will is revoked by a subsequent one either where the latter contains an express clause of revocation, or makes a new and incompatible disposition of the lands.<sup>10</sup> And this is so, although the subsequent will does not take effect by reason of some disability in the devisee;<sup>11</sup> but it is otherwise if it fails to take effect by reason of some imperfection in itself, or want of due execution.<sup>12</sup> And a subsequent will must first be admitted to probate before it can be availed of as a revocation of a former one.<sup>13</sup> A subsequent will which contains no express words



of revocation of a former will and which makes no disposition inconsistent therewith, does not operate to revoke such former will, and both may stand.<sup>14</sup> But two inconsistent wills of even date, unreconciled by any act of the testator, are both void to the extent of their disagreement.<sup>15</sup> It is held that the revocation of a will may be established by proving a subsequent will containing a clause revoking all former wills, although the later will has been lost or destroyed, and no part of its contents other than the clause of revocation can be proved.<sup>16</sup>

1 2 Blackstone's Commentaries, 502; *Martindale v. Warner*, 15 Pa. St. 471; *Succession of Allen*, 48 La. Ann. 1036, 55 Am. St. Rep. 295; *Cheever v. North*, 106 Mich. 390, 58 Am. St. Rep. 499; *Johnes v. Beers*, 57 Conn. 295, 14 Am. St. Rep. 101.

2 *Vynior's Case*, 8 Rep. 82a.

3 *Vynior's Case*, 8 Rep. 82a; *Matter of Michell*, 14 Johns. 324; *Dan v. Brown*, 4 Cow. 490, 15 Am. Dec. 395.

4 *Ford v. Ford*, 7 Humph. 92; *Nelson v. McGiffert*, 3 Barb. Ch. 158, 49 Am. Dec. 170.

5 *Smith v. Wait*, 4 Barb. 28; *Allison v. Allison*, 7 Dana, 94; *Rhodes v. Vinson*, 9 Gill, 169; *Plenty v. West*, 17 Jur. 9; 15 Eng. L. & Eq. 283; *Rich v. Gilkey*, 73 Me. 595; 26 Alb. L. J. 50.

6 See 3 Greenleaf's *Cruise on Real Property*, 82; 4 Kent's *Commentaries*, 520; 2 N. Y. Rev. Stats., sec. 42, p. 64; Cal. Civ. Code, sec. 1292.

7 See *Kenebel v. Scrafton*, 2 East, 530; *Graves v. Sheldon*, 2 D. Chip. 71, 15 Am. Dec. 653; *Dow v. Edlin*, 4 Ad. & E. 582; *Burch v. Wilkins*, 4 Johns. Ch. 506; sec. 339, post.

8 *O'Neill v. Farr*, 1 Rich. 80; *Laughton v. Atkins*, 1 Pick. 543; *Griffiths v. Grieve*, 1 Jacob & W. 31.

9 Jackson v. Halloway, 7 Johns. 394.

10 Boudinot v. Bradford, 2 Dall. 268; Plenty v. West, 17 Jur. 9; 15 Eng. L. & Eq. 234; Matter of Dowd, 58 How. Pr. 107; Ludlum v. Otis, 15 Hun, 410.

11 Laughton v. Atkins, 1 Pick. 543; Sewall v. Robbins, 139 Mass. 164. Contra, Nelson v. McGiffert, 3 Barb. Ch. 158, 49 Am. Dec. 170; Stevens v. Hope, 52 Mich. 65; Rudy v. Ulrich, 69 Pa. St. 177, 8 Am. Rep. 238.

12 Laughton v. Atkins, 1 Pick. 543; Deakins v. Hollis, 7 Gill & J. 311; Reid v. Borland, 14 Mass. 208; and see Cutto v. Gilbert, 29 Eng. L. & Eq. 64

13 Laughton v. Atkins, 1 Pick. 543.

14 Coward v. Marshal, Cro. Eliz. 721; Hearle v. Hicks, 1 Clark & F. 20; Nelson v. McGiffert, 3 Barb. Ch. 158; Brant v. Wilson, 8 Cow. 56. Compare Cutto v. Gilbert, 29 Eng. L. & Eq. 64. See, also, Cheever v. North, 106 Mich. 390, 58 Am. St. Rep. 499; Peck's Appeal, 50 Conn. 562, 47 Am. Rep. 685; Knox v. Knox, 95 Ala. 495, 36 Am. St. Rep. 235.

15 Phipps v. Anglesea, 7 Brown P. C. 443. Compare Bryan v. White, 14 Jur. 919; 5 Eng. L. & Eq. 579.

16 In re Cunningham, 38 Minn. 169, 8 Am. St. Rep. 650.

### § 336. Revocation by Codicil.

A codicil duly executed, and valid in law, has the same effect in revoking a devise as a subsequent will, provided it contains a clause of revocation, or makes a different disposition of the property.<sup>1</sup> But the intent to revoke must be clear;<sup>2</sup> and a codicil professing an intent to dispose of the estate in a different manner from the will, yet not doing so in fact, is only a revocation pro tanto.<sup>3</sup> A codicil executed simultaneously with a will does not operate to revoke the latter.<sup>4</sup> When a testator by a codicil revokes a devise, and

grounds such revocation on the assumption of a fact which proves not to exist, the revocation is regarded as contingent upon the existence of such fact and does not take effect. It falls when its foundation falls.<sup>5</sup>

1 *Attorney General v. Lloyd*, 3 *Atk.* 552; *Hough's Estate*, 20 *L. J. Ch., N. S.*, 422; 6 *Eng. L. & Eq.* 61; *Lainson v. Lainson*, 17 *Jur.* 1172; 23 *Eng. L. & Eq.* 72; *Bosley v. Bosley*, 14 *How.* 390.

2 *Griffiths v. Grieve*, 1 *Jacob & W.* 31; *Locke v. James*, 11 *Mees. & W.* 901; *Brown v. Lawrence*, 3 *Cush.* 390. And see *Mendinhall's Appeal*, 124 *Pa. St.* 387, 10 *Am. St. Rep.* 590.

3 *Brant v. Wilson*, 8 *Cow.* 56; *Newcomb v. Webster*, 113 *N. Y.* 191.

4 *Biddles v. Biddles*, 3 *Curt.* 458.

5 *Dunham v. Averill*, 45 *Conn.* 62, 29 *Am. Rep.* 642; *Mendinhall's Appeal*, 124 *Pa. St.* 387, 10 *Am. St. Rep.* 590; and so, to same effect, *Security Co. v. Snow*, 70 *Conn.* 288, 66 *Am. St. Rep.* 107. Revocation of charitable bequest by codicil: See *Sloan's Appeal*, 168 *Pa. St.* 422, 47 *Am. St. Rep.* 889.

### § 337. Revocation by Express Writing.

Another mode of revocation, provided by the statute of frauds (29 Charles II, c. 3, sec. 6), is by a writing, expressive of an intention to revoke, and signed by the deviser in the presence of three witnesses.<sup>1</sup> But the witnesses are not required to subscribe in the presence of the deviser, as in the case of a devise;<sup>2</sup> hence it is held that although a will may be revoked by a writing, not attested by three witnesses subscribing in the testator's presence, yet, a second will, though containing a clause revoking all former wills, shall

not operate as a revocation unless it is executed in such a manner as to operate as a devise.<sup>3</sup> Under the statute of many of the states no will can be revoked by another writing of the testator, unless such instrument of revocation is executed with the same formalities with which the will itself is required by law to be executed.<sup>4</sup> As it regards such formalities, the statutes of the particular state should be consulted.<sup>5</sup> The rule of ademption has no application to devises of real estate. Hence a devise of real estate is not adeemed or revoked by a subsequent deed of gift of real estate made by the testator to the devisee.<sup>6</sup>

1 See 3 Greenleaf's Cruise on Real Property, 91; *Onions v. Tyrer*, 1 P. Wms. 343; *Hilton v. King*, 3 Lev. 86.

2 See sec. 333, ante.

3 3 Greenleaf's Cruise on Real Property, 91. Compare *Ellis v. Smith*, 1 Ves. 12; *Howard v. Hollaway*, 7 Johns. 394; *Barksdale v. Barksdale*, 12 Leigh, 535; sec. 333a, ante.

4 See 2 N. Y. Rev. Stats., sec. 42, p. 64; *In re Wilcox's Will*, 20 N. Y. Supp. 131; *Burnham v. Comfort*, 108 N. Y. 535, 2 Am. St. Rep. 462; *Perkins v. Jones*, 84 Va. 358, 10 Am. St. Rep. 863; *Hesterberg v. Clark*, 166 Ill. 241, 57 Am. St. Rep. 135; *Eschback v. Collins*, 61 Md. 478, 48 Am. Rep. 123; *Will of Ladd*, 60 Wis. 187, 50 Am. Rep. 355; *Lawson v. Morrison*, 2 Dall. 289, 1 Am. Dec. 288.

5 See 4 Kent's Commentaries, 521; 3 Greenleaf's Cruise on Real Property, 91, 92, note.

6 *Fisher v. Keithley*, 142 Mo. 244, 64 Am. St. Rep. 560; and so, to same effect, *Allen v. Allen*, 13 S. C. 512, 36 Am. Rep. 716; *Burnham v. Comfort*, 108 N. Y. 539, 2 Am. St. Rep. 462. But see contra, *Hansbrough v. Hooe*, 12 Leigh, 321, 37 Am. Dec. 659.

**§ 338. Revocation by Cancellation, etc.**

Revocation of a devise by cancellation is where the instrument of devise is destroyed by burning, tearing, defacing, or some other act of spoliation, with intent thereby to nullify its legal existence as a testament.<sup>1</sup> An act of cancellation unaccompanied by the intention to revoke, is not a revocation;<sup>2</sup> and therefore, if a will be obliterated by accident, it is no revocation.<sup>3</sup> So the intent to revoke must be that of a sane mind;<sup>4</sup> and a lunatic is incompetent to revoke a will, either by a physical destruction of it, or expressly, by a will in writing.<sup>5</sup> If an intention to revoke exists, the act of cancellation, though very slight, is sufficient.<sup>6</sup> Thus, the act of tearing off the seal,<sup>7</sup> drawing lines across the paper,<sup>8</sup> or partially burning the instrument,<sup>9</sup> has been held to be a sufficient revocation.<sup>10</sup> But the act must be done, and not merely intended to be done, or there will be no revocation;<sup>11</sup> as where the testator ordered his son to throw his will into the fire, and the son, in order to deceive the father, threw in another paper, and saved the will, it was held no revocation.<sup>12</sup> And the cancellation of part of a will intentionally restricted to that part, operates as a revocation only *pro tanto*.<sup>13</sup> Duplicate copies of a will constitute in law but one will, and a cancellation of one of the copies revokes the whole.<sup>14</sup> Cancellation in lead pencil, of a will written in ink, is as final and binding as

though made in ink.<sup>15</sup> A will is presumed to have been destroyed, with intent to revoke it, from proof that it cannot be found after the testator's death.<sup>16</sup> But such presumption of revocation may be overcome by circumstantial or other proof to the contrary. And the declarations of the testator are admissible to destroy or to support and strengthen the presumption.<sup>17</sup>

1 3 Greenleaf's Cruise on Real Property, 96; *Dan v. Brown*, 4 Cow. 483, 15 Am. Dec. 395; *Johnson v. Brailsford*, 2 Nott & McC. 272, 10 Am. Dec. 601; *Doe v. Harris*, 6 Ad. & E. 209; *White v. Casten*, 1 Jones, 197, 59 Am. Dec. 585.

2 *Bethel v. Moore*, 2 Dev. & B. 311; *Jackson v. Betts*, 6 Cow. 377; *Giles v. Warren*, L. R. 2 Pro. & D. 401; 3 Eng. Rep. 478; and see *Brown v. Thorndike*, 15 Pick. 388; *Smith v. Fenner*, 1 Gall. 170; *Giddings v. Giddings*, 65 Conn. 149, 48 Am. St. Rep. 192.

3 *Burtenshaw v. Gilbert*, Cowp. 52; and see *Clark v. Scripps*, 16 Jur. 783; 22 Eng. L. & Eq. 627; *Brunt v. Brunt*, L. R. 3 Pro. & D. 37; 5 Eng. Rep. 530; *Giddings v. Giddings*, 65 Conn. 149, 48 Am. St. Rep. 192, and note.

4 *Ford v. Ford*, 7 Humph. 92; *Smith v. Wait*, 4 Barb. 28; *Johnson's Will*, 40 Conn. 587; *Collagan v. Burns*, 57 Me. 419.

5 *Smith v. Wait*, 4 Barb. 28; *Brunt v. Brunt*, L. R. 3 Pro. & D. 37; *Nelson v. McGiffert*, 3 Barb. Ch. 158, 49 Am. Dec. 170; *Rich v. Gilkey*, 73 Me. 595; 26 Alb. L. J. 50. A will can only be canceled by the testator himself, or by some one in his presence, by his express direction: 3 Greenleaf's Cruise on Real Property, 98; *Haines v. Haines*, 2 Vern. 441.

6 *Bibb v. Thomas*, 2 W. Black. 1043; *Johnson v. Brailsford* 2 Nott & McC. 272, 10 Am. Dec. 601.

7 *Price v. Powell*, 3 Hurl. & N. 341; *Avery v. Pixley*, 4 Mass. 460.

8 *Bethel v. Moore*, 2 Dev. & B. 311; Succession of

Muh, 35 La. Ann. 394, 48 Am. Rep. 242. But see Gay v. Gay, 60 Iowa, 415, 46 Am. Rep. 78.

9 Bibb v. Thomas, 2 W. Black. 1043; Doe v. Harris, 6 Ad. & E. 209.

10 See Means v. Moore, 3 McCord, 282; Weeks v. McBeth, 14 Ala. 474; Davis v. Sigourney, 8 Met. 487.

11 Jackson v. Betts, 9 Cow. 208; 6 Wend. 173; Boyd v. Cook, 3 Leigh, 32.

12 Hise v. Fincher, 10 Ired. 139, 51 Am. Dec. 383; and see Graham v. Burch, 47 Minn. 171, 28 Am. St. Rep. 339, and note.

13 Burkitt v. Burkitt, 2 Vern. 498; Boyd v. Martin, 2 Dru. & W. 355; Brown's Will, 1 B. Mon. 57, 35 Am. Dec. 174; Bigelow v. Gillott, 123 Mass. 102, 25 Am. Rep. 32; In re Kirkpatrick, 22 N. J. Eq. 463.

14 Burtonshaw v. Gilbert, Cowp. 49; O'Neill v. Farr, 1 Rich. 80.

15 Estate of Tomlinson, 133 Pa. St. 245, 19 Am. St. Rep. 637; and see Myers v. Vanderbelt, 84 Pa. St. 510, 24 Am. Rep. 227.

16 Collyer v. Collyer, 110 N. Y. 486, 6 Am. St. Rep. 405; Foster's Appeal, 87 Pa. St. 67, 30 Am. Rep. 340.

17 Behrens v. Behrens, 47 Ohio St. 323, 21 Am. St. Rep. 820; and see Collagan v. Burns, 57 Me. 465; In re Johnson's Will, 40 Conn. 587; Keen v. Keen, L. R. 3 Pro. & D. 105.

### § 339. Implied Revocation of.

Certain alterations in the social relations of the testator, or in the estate which is the subject of the devise, have been held to operate as implied revocations of a devise.<sup>1</sup> Thus, the subsequent marriage of a testator, followed by the birth of a child, operate to revoke a devise;<sup>2</sup> for the reason that a complete alteration in the situation and duties of the testator is thereby produced.<sup>3</sup> The law annexes to a will the tacit condition that if

the testator afterward marries, and has a child born of such marriage, the will is ipso facto revoked.<sup>4</sup> And it is immaterial whether, at the time he made his will, the testator was a bachelor, a widower, or a married man with children.<sup>5</sup> And the birth of a posthumous child sufficiently meets the requirement of the law.<sup>6</sup> At common law, the will of an unmarried woman is impliedly revoked by her subsequent marriage;<sup>7</sup> though if the wife survived her husband the will was held to be revived.<sup>8</sup> Any alteration of the testator's estate in the lands devised, as by a conveyance of the whole or a part thereof, operates as a revocation of the devise, either wholly or pro tanto, according to the extent of the alienation.<sup>9</sup> And even an agreement to convey lands specifically devised was held to be a revocation of the devise in equity, though not at law.<sup>10</sup> A mortgage of the lands devised is a revocation pro tanto.<sup>11</sup> A conveyance to trustees in fee, after a devise, operates as a revocation of the devise, although the testator takes back the old use.<sup>12</sup> But a conveyance procured by fraud or a void conveyance will not operate to revoke a prior devise.<sup>13</sup> And a mere alteration of the quality of an estate, without intent to vary the quantity of the interest, is no revocation of a previous devise.<sup>14</sup>

1 See *Doc v. Lancashire*, 5 Term Rep. 49; *Carter v. Thomas*, 4 Me. 341; *Walton v. Walton*, 7 Johns. Ch. 258, 11 Am. Dec. 456; *Havens v. Vandenberg*, 1 Denio, 27; *Verdier v. Verdier*, 8 Rich. 135. By the English  
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statute, 1 Victoria, chapter 26, a will shall be construed to speak at the time of the death of the testator: See *Farrar v. Winterton*, 5 Beav. 1.

2 *Christopher v. Christopher*, 4 Burr. 2182; *Doe v. Lancashire*, 5 Term Rep. 49; *Havens v. Vandenberg*, 1 Denio, 27; *Goodtitle v. Otway*, 2 H. Black. 522; *Burch v. Wilkins*, 4 Johns. Ch. 506; *Hulett v. Carey*, 66 Minn. 327, 61 Am. St. Rep. 419.

3 3 Greenleaf's Cruise on Real Property, 104; and see *Warner v. Beach*, 4 Gray, 162; *Verdier v. Verdier*, 8 Rich. 135; *Negus v. Negus*, 46 Iowa, 487, 26 Am. Rep. 157; *Ash v. Ash*, 9 Ohio St. 386.

4 *Marston v. Roe*, 8 Ad. & E. 14; *Sneed v. Ewing*, 5 J. J. Marsh. 460, 22 Am. Dec. 41; and see *Kenebel v. Scrafton*, 2 East, 530; *Gibbons v. Caunt*, 4 Ves. 848. Compare *Brady v. Cubitt*, Doug. 31.

5 *Havens v. Vandenberg*, 1 Denio, 27; *Doe v. Lancashire*, 5 Term Rep. 49.

6 *Doe v. Lancashire*, 5 Term Rep. 49; *Fallon v. Chidester*, 46 Iowa, 588, 26 Am. Rep. 164. Compare *Doe v. Barford*, 4 Maule & S. 10. The rules stated in the text have been modified by statutory provisions in several of the states, and the statute of the particular state should be consulted: See 2 N. Y. Rev. Stats., sec. 43, p. 64; *Smith v. Robertson*, 24 Hun, 210; *Wilson v. Foster*, 6 Met. 400, 39 Am. Dec. 736; *Tomlinson v. Tomlinson*, 1 Ashm. 224; *Wheeler v. Wheeler*, 1 R. I. 364; *Jacks v. Henderson*, 1 Desaus. 557; *Ordish v. McDermott*, 2 Redf. 460; *Rhodes v. Weldy*, 46 Ohio St. 231, 15 Am. St. Rep. 584, and note.

7 *Hodsden v. Lloyd*, 2 Bro. C. C. 534; *Doe v. Staples*, 2 Term Rep. 696; 4 Kent's Commentaries, 527; *Proctor v. Clark*, 3 Redf. 445. Compare *Brown v. Clark*, 16 Hun, 559; 77 N. Y. 369; *Swan v. Hammond*, 138 Mass. 45, 52 Am. Rep. 255; *In re Kaufman*, 131 N. Y. 620.

8 *Forse v. Hembling*, 4 Rep. 61a; 3 Greenleaf's Cruise on Real Property, 110. Compare *Morwan v. Thompson*, 3 Hagg. 239.

9 *Sparrow v. Hardcastle*, 3 Atk. 799; *Wiggin v. Swett*, 6 Met. 194, 39 Am. Dec. 716; *Howes v. Humphrey*, 9 Pick. 361, 20 Am. Dec. 481; *Herrington v. Budd*, 5 Denio, 321; *Arthur v. Arthur*, 10 Barb. 9; *Rose*

v. Rose, 7 Barb. 174; Brigham v. Winchester, 1 Met. 390. See sec. 337, ante.

10 Cotter v. Layer, 2 P. Wms. 626; Rider v. Wager, 2 P. Wms. 328; Donohoo v. Lea, 1 Swan, 119; Walton v. Walton, 7 Johns. Ch. 258, 11 Am. Dec. 456.

11 McTaggart v. Thomson, 14 Pa. St. 149.

12 Walton v. Walton, 7 Johns. Ch. 258, 11 Am. Dec. 456; Marwood v. Turner, 3 P. Wms. 163.

13 Wright v. Littler, 3 Burr. 1244; Hawes v. Wyatt, 3 Bro. C. C. 156; Mathews v. Venables, 2 Bing. 136.

14 Brydes v. Chandos, 2 Ves. 417; Sparrow v. Hardcastle, 3 Atk. 798; Livingston v. Livingston, 3 Johns. Ch. 156.

### § 339a. Same—Continued.

We have seen in the preceding section that, at common law, marriage revoked a woman's will previously made. And this doctrine is still maintained in some of the states where the statute secures to a married woman the absolute right to dispose of her property during coverture.<sup>1</sup> It is held, on the other hand, that under such legislation her common-law disabilities are removed, and the will made before marriage remains unrevoked by that change in the testator's life.<sup>2</sup> And it is now held in New York that if a married woman makes a valid will, after which her husband dies and she contracts a second marriage, her will is not thereby revoked.<sup>3</sup> The common-law rule that marriage of a woman revoked her will previously made had its exceptions; as where her power of disposing of her separate property after marriage was preserved by an antenuptial agreement, her will previously made was not revoked by such

marriage.<sup>4</sup> When at the time a divorce is granted the parties settle their property rights by mutual agreement in writing, without mentioning mutual wills made by them ten years previously, by which each devised to the other all of his or her property, the decree of divorce and settlement constitute an implied revocation of the wills.<sup>5</sup> The birth of an illegitimate child, recognized and acknowledged by the father, was held to revoke a will made before the birth of the child.<sup>6</sup> Under a statute providing that "marriage shall be deemed a revocation of a prior will," such a will is absolutely revoked as to all persons by marriage.<sup>7</sup> In New Hampshire, a will is not revoked by death of beneficiaries, by marriage of the testator, without issue, by alienation of the greater part of the estate specifically devised, by the acquisition of a much larger estate, nor by the concurrence of all these events.<sup>8</sup> And where the intention of the testator appears to have been to convey all his estate by will, a subsequent trust deed of the property devised, with a power of revocation, which is subsequently exercised, does not work a revocation of the will.<sup>9</sup>

1 See *Swan v. Hammond*, 138 Mass. 45, 52 Am. Rep. 255; *Ellis v. Darden*, 86 Ga. 368; *Smith v. Clemson*, 6 Houst. 171; *Matter of Kaufman*, 131 N. Y. 620.

2 *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 328; *In re Tuller*, 79 Ill. 99, 22 Am. Rep. 164; *Emery's Appeal*, 81 Me. 275; *Noyes v. Southworth*, 55 Mich. 173, 54 Am. Rep. 359; *Roane v. Hollingshead*, 76 Md. 369, 35 Am. St. Rep. 438; *Will of Ward*, 70 Wis. 251, 5 Am. St. Rep. 174.

3 *Matter of McLarney*, 153 N. Y. 416, 60 Am. St. Rep. 664.

4 *Bradish v. Gibbs*, 3 Johns. Ch. 523; *Barnes v. Irwin*, 2 Dall. 199, 1 Am. Dec. 278; 1 Yeates, 221; and see *Stewart v. Mulholland*, 88 Ky. 38, 21 Am. St. Rep. 320, recognizing and enforcing this exception.

5 *Lansing v. Haynes*, 95 Mich. 16, 35 Am. St. Rep. 545.

6 *Milburn v. Milburn*, 60 Iowa, 411.

7 *McAnnulty v. McAnnulty*, 120 Ill. 26, 60 Am. Rep. 552. Compare *Stewart v. Mulholland*, 88 Ky. 38, 21 Am. St. Rep. 320.

8 *Hoitt v. Hoitt*, 63 N. H. 475, 56 Am. Rep. 530.

9 *Morey v. Sohler*, 63 N. H. 507, 56 Am. Rep. 538.

### § 340. Republication of.

A devise once revoked may be revived by a republication of the will, the effect of which is the opposite of that of revocation.<sup>1</sup> And a will originally void and inoperative by reason of the incapacity of the testator may be rendered valid and operative by a republication, after the testator becomes capacitated to make a valid will.<sup>2</sup> One mode of republication is by a re-execution of the will, and, prior to the statute of frauds, any words importing an intention to republish amounted to a republication.<sup>3</sup> Since the statute, it was at first held that there could be no implied republication, but that the paper containing the devise must be re-executed.<sup>4</sup> It was, however, settled by later decisions that a codicil, duly attested, whether attached to the will or not, operates as a republication of such will, and passes after-acquired lands.<sup>5</sup> The effect of the codicil,

if not neutralized by internal evidence of a contrary intention, is to republish the will.<sup>6</sup> But if the effect of a codicil is expressly confined to the lands devised by the will, it will not operate to pass after-acquired lands.<sup>7</sup> The cancellation of a second will may operate as a republication of a prior uncanceled will.<sup>8</sup> But nothing short of a re-execution of a will once canceled will amount to a republication thereof.<sup>9</sup> It is held that although a will is revoked by the marriage of the testator after its execution, it may nevertheless be republished and revived by a codicil executed subsequently to the marriage.<sup>10</sup> The execution of a codicil has the effect to republish the whole will, modified by the codicil, as of the date of the codicil, and both are to be construed together as a single instrument executed at the date of the codicil.<sup>11</sup>

1 See 3 Greenleaf's Cruise on Real Property, 142; Van Cortland v. Kip, 1 Hill, 590; Haven v. Foster, 14 Pick. 541.

2 Braham v. Burchell, 3 Add. 243; O'Neill v. Farr, 1 Rich. 80.

3 3 Greenleaf's Cruise on Real Property, 142. See Battle v. Speight, 10 Ired. 459.

4 Martin v. Savage, 1 Ves. 440; 3 Greenleaf's Cruise on Real Property, 142.

5 Piggott v. Waller, 7 Ves. 98; Atherton v. Robins, 1 Ad. & E. 423; Murray v. Oliver, 6 Ired. Eq. 55; Jack v. Shoenberger, 22 Pa. St. 416; Van Cortland v. Kip, 1 Hill, 590; Jackson v. Potter, 9 Johns. 312; Wait v. Belding, 24 Pick. 129; Harvey v. Chouteau, 14 Mo. 587; Wikoff's Appeal, 15 Pa. St. 281, 53 Am. Dec. 597. See Haven v. Foster, 14 Pick. 534.

6 *Van Cortland v. Kip*, 1 Hill, 590; *Movers v. White*, 6 Johns. Ch. 375; *Doe v. Marchant*, 6 Man. & G. 813; *Doe v. Walker*, 12 Mees. & W. 591. See *Sturgis v. Work*, 122 Ind. 134, 17 Am. St. Rep. 349.

7 *Pigott v. Waller*, 7 Ves. 124; *Strathmore v. Bowes*, 7 Term Rep. 482.

8 3 *Greenleaf's Cruise on Real Property*, 151, 152. Compare *James v. Cohen*, 3 Curt. 770; *Flintham v. Bradford*, 10 Pa. St. 82; 4 *Kent's Commentaries*, 531; *Matter of Simpson*, 56 How. Pr. 125.

9 *Harwood v. Goodright*, Cowp. 92. See *Jackson v. Potter*, 9 Johns. 312; *Witter v. Mott*, 2 Conn. 67. In England, a will once revoked can only be revived by the re-execution thereof, or by a codicil showing an intent to revive it: Stat. 1 Vict., c. 26, sec. 22. Similar provisions exist in the statutes of some of the states: See 2 N. Y. Rev. Stats., sec. 53, p. 66; *Stewart v. Mulholland*, 88 Ky. 38, 21 Am. St. Rep. 320.

10 *Barney v. Hayes*, 11 Mont. 571, 28 Am. St. Rep. 495.

11 *In re Ladd*, 94 Cal. 670; and see *Gilmor's Estate*, 154 Pa. St. 523, 35 Am. St. Rep. 855; *Linnard's Appeal*, 93 Pa. St. 316, 39 Am. Rep. 753; *Hawke v. Euyart*, 30 Neb. 149, 27 Am. St. Rep. 391; *Gelbke v. Gelbke*, 88 Ala. 427; *Warner v. Morse*, 149 Mass. 400; *Pate v. French*, 122 Ind. 10.

### § 341. When Void.

By the common law, if the testator disposes of his estate as the law would have done had he been silent, the will, being unnecessary, is void;<sup>1</sup> as where a person devises his real estate in fee to his heir at law, the devise is a mere nullity, and the heir will take by descent, which is the better title.<sup>2</sup> But a difference in the quality of the estate will give effect to the devise;<sup>3</sup> and so, it seems, where the estate differs in point of quantity.<sup>4</sup> Fraud or imposition practiced upon the

testator will invalidate a devise.<sup>5</sup> So a devise may be void for uncertainty, either as it respects the person or object of the testator's bounty,<sup>6</sup> or the thing devised.<sup>7</sup> But a devise will seldom be declared void for uncertainty unless the instrument of devise be incapable of any clear meaning whatever.<sup>8</sup> A devisee may by deed renounce and disclaim a devise, in which case the devise becomes void, and the lands descend to the heir.<sup>9</sup> An alteration of a will by a party claiming under it invalidates the will and avoids a devise.<sup>10</sup> An interlineation in a will after it has been duly executed and attested, though made in the presence of the testator and that of the witnesses to the will, there being no further signing by him nor attestation by them, has no effect whatever on the will.<sup>11</sup> A testator cannot, by the obliteration of certain words in his will, convert a life estate into a fee simple, and the will should be read as it was originally written and executed.<sup>12</sup>

1 See sec. 329, ante.

2 *Lord v. Bourne*, 63 Me. 368, 18 Am. Rep. 234; *Sedgwick v. Minot*, 6 Allen, 171; *Buckley v. Buckley*, 11 Barb. 43.

3 *Bear's Case*, 1 Leon. 112; 3 *Greenleaf's Cruise on Real Property*, 158.

4 *Scott v. Scott*, Amb. 383; and see *Swaine v. Burton*, 15 Ves. 371. But see *Doe v. Timins*, 1 Barn. & Ald. 530.

5 *Webb v. Claverden*, 2 Atk. 424; *Kerrick v. Bransby*, 7 Brown P. C. 437; and see *Johnson's Will*, 40 Conn. 587; *Collagan v. Burns*, 57 Me. 449; *Brunt v. Brunt*, L. R. 3 Pro. & D. 37; *Parramore v. Taylor*, 11 Gratt. 220;

Florey v. Florey, 24 Ala. 241; Waterman v. Whitney, 11 N. Y. 157; Allman v. Pigg, 82 Ill. 149, 25 Am. Rep. 303; Brick v. Brick, 66 N. Y. 144.

6 Weatherhead v. Sewell, 9 Humph. 272; 11 How. 329; White v. Fisk, 22 Conn. 31; Gallego v. Attorney General, 3 Leigh, 450; Townsend v. Downer, 23 Vt. 225; Pugh v. Goodtitle, 3 Brown P. C. 454; Adams v. Jones, 16 Jur. 159; 9 Eng. L. & Eq. 269; Adye v. Smith, 44 Conn. 60, 26 Am. Rep. 424.

7 Jubber v. Jubber, 9 Sim. 503; Attorney General v. Hinkman, 2 Jacob & W. 270; Lucas v. Duffield, 6 Gratt. 456; Bayeaux v. Bayeaux, 8 Paige, 333. A devise to the testator's wife, for life or widowhood, with remainder after her death or marriage to her children, is in restraint of marriage and void: Stilwell v. Knapper, 69 Ind. 558, 35 Am. Rep. 240; and see Coon v. Bean, 69 Ind. 474. But compare Hibbits v. Jack, 97 Ind. 570, 49 Am. Rep. 478; Phillips v. Ferguson, 85 Va. 509, 17 Am. St. Rep. 78; Mann v. Jackson, 84 Me. 400, 30 Am. St. Rep. 358, fully discussing the subject of devises in restraint of marriage.

8 Mason v. Robinson, 2 Sim. & St. 295; and see Vernon v. Henry, 6 Watts, 192; Den v. M'Murtrie, 15 N. J. L. 276; and see Timberlake v. Harris, 7 Ired. Eq. 188; M'Cullough v. Gilmore, 11 Pa. St. 370.

9 3 Greenleaf's Cruise on Real Property, 170; and see Doe v. Smyth, 6 Barn. & C. 112; Ives v. Allyn, 13 Vt. 609; Webster v. Gilman, 1 Story, 499, 514; Ex parte Fuller, 2 Story, 330. Acceptance of a devise is necessary to vest title in the devisee: Defreese v. Lake, 109 Mich. 415, 63 Am. St. Rep. 584.

10 Jackson v. Malin, 15 Johns. 293. A will may be valid although the draughtsman is a beneficiary under it: Cheatham v. Hatcher, 30 Gratt. 56, 32 Am. Rep. 650.

11 Hesterberg v. Clark, 166 Ill. 241, 57 Am. St. Rep. 135; and so, to same effect, In re Wilcox's Will, 20 N. Y. Supp. 131; Doane v. Hadlock, 42 Me. 72.

12 Eschbach v. Collins, 61 Md. 478, 48 Am. Rep. 123.

### § 341a. Validity of Wills—Continued.

A will may be valid though written in a language not understood by the testator.<sup>1</sup> A de-



vis upon condition that the devisee named shall have become reformed of evil habits, at the expiration of ten years from the death of the testator, is valid, and will be upheld.<sup>2</sup> But a condition in a devise in restraint of the marriage relation and its continuance is void, and the devise may be operative to the same extent as though such condition had not been attached.<sup>3</sup> An attempt in a will to create a future estate in land, such as would constitute an unlawful suspension of alienation, will render the disposition void.<sup>4</sup> But provisions in a will requiring a trustee to hold and manage the trust property until the beneficiary reaches an age beyond twenty-one years are not necessarily void, if the interest of the beneficiary is vested and absolute.<sup>5</sup> A devise by husband to wife is not presumptively fraudulent, requiring equity to charge the devise with a trust in favor of those who may stand in the relation of heirs.<sup>6</sup> In the absence of a valid testamentary disposition by a testator of any part of his estate, it vests in his heir at law.<sup>7</sup> The law of the place where the land lies controls the validity of every devise of real estate.<sup>8</sup>

1 Will of Walter, 64 Wis. 487, 54 Am. Rep. 640.

2 Hawke v. Euyart, 30 Neb. 149, 27 Am. St. Rep. 391.

3 Hawke v. Euyart, 30 Neb. 149, 27 Am. St. Rep. 391; and see Conrad v. Long, 33 Mich. 78; Wren v. Bradley, 2 De Gex & S. 49.

4 Ford v. Ford, 70 Wis. 19, 5 Am. St. Rep. 117.

5 Claflin v. Claflin, 149 Mass. 19, 14 Am. St. Rep. 393; and see Lampert v. Haydel, 96 Mo. 439, 9 Am. St.

Rep. 358; *Smith v. Towers*, 69 Md. 77, 9 Am. St. Rep. 398, and note.

6 *Orth v. Orth*, 145 Ind. 184, 57 Am. St. Rep. 185.

7 *Heidenheimer v. Bauman*, 84 Tex. 174, 31 Am. St. Rep. 29.

8 *Nelson v. Potter*, 50 N. J. L. 324; *Robertson v. Pickrell*, 109 U. S. 608. See sec. 327, ante.

### § 341b. Same—Undue Influence.

Undue influence, to affect a will, must, in a measure at least, destroy free agency and operate on the mind of the testator at the time of making the will.<sup>1</sup> It exists wherever through weakness, ignorance, dependence, or implicit reliance of one on the good faith of another the latter obtains an ascendancy which prevents the former from exercising an unbiased judgment.<sup>2</sup> But solicitations, however importunate, cannot of themselves constitute undue influence.<sup>3</sup> And undue influence is not proved by disclosing relations of friendship and affection between the parties, and by showing kindly offices and proper conduct on the part of the devisee toward the testator.<sup>4</sup> The burden of proof to show undue influence generally rests upon the contestants of the will.<sup>5</sup> When a will is contested, the burden is on the proponents of the will to prove its execution and attestation, and also that the testator was of proper age and of sound mind. These facts having been shown, a will *prima facie* valid is established, and it then devolves upon the contestants to prove fraud or undue influence if either is charged.<sup>6</sup> And they

must satisfy the jury, by substantial evidence, that the will was the product of such influence.<sup>7</sup> If the evidence shows that the will was in part the result of undue influence, and in part the act of the testator's own free will, it is not wholly void, and the latter part must stand while the former part must be annulled.<sup>8</sup> When the person who drafts the will or participates in procuring its provisions from the testator also occupies a relation of special confidence toward him, and would not be a beneficiary in the absence of the will, and is specially benefited by its terms, the presumption of undue influence arises, and the burden of proof is then on him to show that the will was executed freely and without his influence.<sup>9</sup> But it is held that undue influence is not to be presumed from the fact that a testator devises all his estate to a woman with whom he was unlawfully cohabiting, to the exclusion of his kindred.<sup>10</sup> A will obtained by fraud or undue influence in the first instance is void, and no subsequent ratification will render it valid without a formal re-execution or republication.<sup>11</sup>

1 *Tawney v. Long*, 76 Pa. St. 115; *Waddington v. Buzby*, 45 N. J. Eq. 173, 14 Am. St. Rep. 706; *Fry v. Jones*, 95 Ky. 148, 44 Am. St. Rep. 206, and note; *Knox v. Knox*, 95 Ala. 495, 36 Am. St. Rep. 235.

2 *Herster v. Herster*, 122 Pa. St. 239, 9 Am. St. Rep. 95; and so, to same effect, *McCulloch v. Campbell*, 49 Ark. 367; *Gay v. Gillian*, 92 Mo. 250, 1 Am. St. Rep. 712, and note; *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552; *Hartman v. Strickler*, 82 Va. 225.

3 *Trost v. Dingler*, 118 Pa. St. 259, 4 Am. St. Rep. 593.

4 *Goodbar v. Lidikey*, 136 Ind. 1, 43 Am. St. Rep. 296; *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33; *In re Hess' Will*, 48 Minn. 504, 31 Am. St. Rep. 665, and note.

5 *In re Hess' Will*, 48 Minn. 504, 31 Am. St. Rep. 665, and note; *Armstrong v. Armstrong*, 63 Wis. 169; *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828; *Eastis v. Montgomery*, 95 Ala. 486, 36 Am. St. Rep. 227.

6 *Norton v. Paxton*, 110 Mo. 456; *Maddox v. Maddox*, 114 Mo. 35, 35 Am. St. Rep. 734; *Egbers v. Egbers*, 177 Ill. 82.

7 *Cash v. Lust*, 142 Mo. 630, 64 Am. St. Rep. 576.

8 *Lyons v. Campbell*, 88 Ala. 462; *Henry v. Hall*, 106 Ala. 84, 54 Am. St. Rep. 22; *Harrison's Appeal*, 48 Conn. 202.

9 *Richmond's Appeal*, 59 Conn. 226, 21 Am. St. Rep. 85, and note.

10 *Porschet v. Porschet*, 82 Ky. 93, 56 Am. Rep. 880; and see, to same effect, *Dickie v. Carter*, 42 Ill. 376; *Monroe v. Barclay*, 17 Ohio St. 302, 93 Am. Dec. 620; *Main v. Ryder*, 84 Pa. St. 217.

11 *Haines v. Hayden*, 95 Mich. 332, 35 Am. St. Rep. 566; *Chaddick v. Haley*, 81 Tex. 617.

### § 341c. Disinheritance of Heir.

An heir at law can only be disinherited by an express devise or by necessary implication, and such implication must amount to such a strong probability that an intention to the contrary cannot be supposed.<sup>1</sup> Although the intention to disinherit the heir be ever so apparent, he must nevertheless inherit, unless the estate is given to somebody else.<sup>2</sup> The rule laid down in construing the provisions of the California Civil Code,

section 1307, is, that in order to disinherit a child whose name is omitted from a will, an intention so to do must appear from words on the face of the will indicating such intent directly, or by implication equally as strong, that the testator had the child omitted in his mind, and so having him, had omitted to make any mention of him;<sup>3</sup> and parol evidence to show that the testator intentionally omitted to provide for his children is held to be inadmissible.<sup>4</sup> Disinheritance of some of the children of the testator, without apparent cause, imposes upon those claiming under the will the necessity of giving some reasonable explanation of its unnatural character.<sup>5</sup> A pretermitted child succeeds to the same portion of the testator's estate that he would have had if the testator had died intestate.<sup>6</sup> But it is held that a child and heir at law of a testator, for whom his father has by mistake failed to provide by the will, but who, being of full age, has appeared in proceedings resulting in a judgment establishing the will cannot recover land thereby devised.<sup>7</sup>

1 *Bender v. Dietrick*, 7 Watts & S. 284; *Estate of Jacobs*, 140 Pa. St. 268, 23 Am. St. Rep. 230.

2 *Coffman v. Coffman*, 85 Va. 459, 17 Am. St. Rep. 69.

3 *Estate of Stevens*, 83 Cal. 322, 17 Am. St. Rep. 252.

4 *Estate of Stevens*, 83 Cal. 322, 17 Am. St. Rep. 252; *Estate of Garraud*, 35 Cal. 336; *Estate of Wardell*, 57 Cal. 493; *Rhoton v. Blevin*, 99 Cal. 648; *In re Salmon*, 107 Cal. 616, 48 Am. St. Rep. 165; *Estate of Callaghan*, 119 Cal. 575; and so, *Bower v. Bower*, 5 Wash. 228; *Hill*

v. Hill, 7 Wash. 409; Boman v. Boman, 49 Fed. Rep. 332; Lurie v. Radnitzer, 166 Ill. 609, 57 Am. St. Rep. 157. But see contra, decided under a different statute: Conlam v. Doull, 4 Utah, 277; affirmed, 133 U. S. 232; In re Atwood, 14 Utah, 1, 60 Am. St. Rep. 878; Buckley v. Gerard, 123 Mass. 8; Whittemore v. Russell, 80 Me. 297, 6 Am. St. Rep. 200. Compare Estate of Stebbins, 94 Mich. 304, 34 Am. St. Rep. 345.

5 Gay v. Gillian, 92 Mo. 250, 1 Am. St. Rep. 712.

6 Estate of Wardell, 57 Cal. 489; Smith v. Olmstead, 88 Cal. 582, 22 Am. St. Rep. 336; Ward v. Ward, 120 Ill. 111.

7 Newman v. Waterman, 63 Wis. 612, 53 Am. Rep. 310.

## § 342. How Construed.

A devise is not to be construed strictly, like a deed, but liberally, and according to the intent.<sup>1</sup> The intention of the testator, as collected from the entire will with its codicils, must prevail, if not inconsistent with the rules of law.<sup>2</sup> Words are, in general, to be taken in their ordinary and grammatical sense in the absence of a clear intention to the contrary.<sup>3</sup> And a construction which will give them all effect is to be preferred to one which will render some of them inoperative.<sup>4</sup> Technical words are presumed to be used in their legal sense, where a contrary intention is not apparent.<sup>5</sup> But if the testator's intention is plain, it will control the legal operation of the words, however technical.<sup>6</sup> Introductory words will be regarded by the courts in determining the intention of the testator, where such intention is doubtfully expressed.<sup>7</sup> And a dubious expression may be ex-

plained by a codicil, or even by a schedule annexed to the will.<sup>8</sup> Words obviously miswritten may be corrected.<sup>9</sup> If the intention of the testator appears to require it, the word "or" may be construed "and," and vice versa.<sup>10</sup> And the word "her" has been construed to mean "their," in order to effect the intent.<sup>11</sup> A palpable omission of a word may be supplied;<sup>12</sup> and a word which is irreconcilable with the general scope of the will, and in conflict with the expressed intentions of the testator, may be rejected.<sup>13</sup> General words in one part of a will may be restrained by subsequent particular ones, and so construed as not to defeat the intent of the testator.<sup>14</sup> A will of real property must be construed according to the laws of the place where the lands, the subject of the devise, are situated.<sup>15</sup>

1 *Brearley v. Brearley*, 9 N. J. Eq. 21; *Den v. McMurrrie*, 15 N. J. L. 276; *Defflis v. Goldschmidt*, 19 Ves. 569; *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 307.

2 *Lynch v. Pendergast*, 67 Barb. 501; *Westcott v. Cady*, 5 Johns. Ch. 343, 9 Am. Dec. 306; *Berry v. Berry*, 1 Har. & J. 421; *Stokes v. Tilley*, 9 N. J. Eq. 130; *Finlay v. King*, 3 Pet. 346; *Land v. Otley*, 4 Rand. 313; *Richardson v. Noyes*, 2 Mass. 58, 3 Am. Dec. 324; *Bonard's Will*, 16 Abb. Pr., N. S., 128; *Morrison v. Estate of Sessions*, 70 Mich. 297, 14 Am. St. Rep. 500; *Elliott v. Elliott*, 117 Ind. 380, 10 Am. St. Rep. 54; *Goebel v. Wolf*, 113 N. Y. 405, 10 Am. St. Rep. 464; *Noe v. Kern*, 93 Mo. 367, 3 Am. St. Rep. 544; *Greene v. Greene*, 125 N. Y. 506, 21 Am. St. Rep. 743; *Garth v. Garth*, 139 Mo. 456; *Watkins v. Snadon*, 93 Ky. 501, 40 Am. St. Rep. 203, and note; *Matter of James*, 146 N. Y. 78, 48 Am. St. Rep. 774; *L'Etourneau v. Henquenet*, 89 Mich. 428, 28 Am. St. Rep. 310; *Dickison v. Dickison*, 138 Ill.

541, 32 Am. St. Rep. 163; *Murphy v. Carlin*, 113 Mo. 112, 35 Am. St. Rep. 699; *Reid v. Hancock*, 10 Humph. 368.

3 *Doe v. Thomas*, 1 Man. & G. 335; *Jones v. Posten*, 1 Ired. 166; *Mowatt v. Carow*, 7 Paige, 328; *Hone v. Van Schaik*, 4 N. Y. 538.

4 *Mowatt v. Carow*, 7 Paige, 328; *Ernst v. Foster*, 58 Kan. 438; *Succession of Allen*, 48 La. Ann. 1036, 55 Am. St. Rep. 295, and note.

5 *Read v. Backhouse*, 2 Russ. & M. 546; *Den v. Blackwell*, 15 N. J. L. 386; *Leathers v. Gray*, 101 N. C. 162, 9 Am. St. Rep. 30.

6 *Den v. Blackwell*, 15 N. J. L. 386; *Lasher v. Lasher*, 13 Barb. 106; *Dow v. Dow*, 36 Me. 211; *Vauchamp v. Bell*, 6 Madd. 343; *Boisseau v. Aldridges*, 5 Leigh, 222, 27 Am. Dec. 500.

7 *Barheydt v. Barheydt*, 20 Wend. 576; *Hogan v. Jackson*, Cowp. 306; and see *Beal v. Holmes*, 6 Har. & J. 205.

8 3 *Greenleaf's Cruise on Real Property*, 177; *Hayes v. Foorde*, 2 W. Black. 698.

9 *Keith v. Perry*, 1 Desaus. 353.

10 *Walsh v. Peterson*, 3 Atk. 193; *Penny v. Turner*, 15 Sim. 368; *Roome v. Phillips*, 24 N. Y. 463; *Linstead v. Green*, 2 Md. 82; *Mitchell v. Mitchell*, 18 Md. 405; *Shands v. Rogers*, 7 Rich. Eq. 422; *Phelps v. Bates*, 54 Conn. 11, 1 Am. St. Rep. 92; *Slingluff v. Johns*, 87 Md. 273; *Morris v. Morris*, 17 Jur. 966; 21 Eng. L. & Eq. 152. "Or" may be substituted for "with" where such substitution will make clear the intent of the testator: *Hallowell's Estate*, 11 Phila. 55.

11 *Keith v. Perry*, 1 Desaus. 353.

12 *Hall v. Thompson*, 23 Hun, 334; *Covenhoven v. Schuler*, 2 Paige, 122, 21 Am. Dec. 73.

13 *Lattimer v. Blumenthal*, 61 How. Pr. 360; *Mason v. Jones*, 2 Barb. 229; and see *Bartlett v. King*, 12 Mass. 543, 12 Am. Dec. 799; *Lynch v. Hill*, 6 Munt. 114; *Rawson v. Clark*, 38 Me. 223; *Chambers v. Brailsford*, 18 Ves. 368; 19 Ves. 652; *Dickison v. Dickison*, 138 Ill. 541, 32 Am. St. Rep. 163; *Evens v. Griscom*, 42 N. J. L. 579, 36 Am. Rep. 542.

14 3 *Greenleaf's Cruise on Real Property*, 176. Compare *Doe v. Applin*, 4 Term Rep. 82; *Doe v. Charlton*,



1 Man. & G. 429; Doe v. Gallini, 5 Barn. & Adol. 621; 3 Ad. & E. 341.

15 Trotter v. Trotter, 4 Bligh, N. S., 502. Compare sec. 328, ante.

### § 342a. Same—Continued.

The true test of the character of an instrument, as to whether it is a will, is the testator's intention to create a revocable disposition of his property, to accrue and take effect only upon his death, and passing no present interest. The death of the maker establishes, for the first time, the character of the instrument.<sup>1</sup> And it must satisfactorily appear that the testator intended the very paper to be his will. Unless it so appear, the paper must be rejected, and the title of the heirs at law must prevail.<sup>2</sup> A conveyance otherwise perfect in form is not converted into a will by the insertion of a clause declaring that it is to go into effect after the death of the grantor, and that he claims the right to hold the land so long as he lives.<sup>3</sup> It has been held, on the other hand, that an instrument, though in form a deed, which is to operate only after the death of the maker, is a will.<sup>4</sup> The controlling inquiry is the intention of the maker, to be gathered from the language and the attendant circumstances.<sup>5</sup> The law favors the vesting of estates, and, if possible, construes the terms of a will as creating a vested estate.<sup>6</sup> Any construction which would result in partial intestacy should, if possible, be avoided;<sup>7</sup> and at the same time the construction should be

such as not to disinherit the heirs at law, unless on so strong a probability that an intention to the contrary cannot reasonably be supposed.<sup>8</sup> A devise of lands cannot result from a bequest of a chest and its contents, though a part of such contents is an undelivered conveyance from the testator to the legatee.<sup>9</sup>

1 *Nichols v. Emery*, 109 Cal. 323, 50 Am. St. Rep. 43. See sec. 325, ante.

2 *McBride v. McBride*, 26 Gratt. 476; *Sutherland v. Sydnor*, 84 Va. 880; *In re Richardson*, 94 Cal. 65; *Estate of Meade*, 118 Cal. 428, 62 Am. St. Rep. 244.

3 *White v. Hopkins*, 80 Ga. 154; *Seals v. Pierce*, 83 Ga. 787, 20 Am. St. Rep. 344; and see, also, *Claiborne v. Radford*, 91 Va. 527.

4 *Hazleton v. Reed*, 46 Kan. 73, 26 Am. St. Rep. 86; *Estate of Lautenshlager*, 80 Mich. 285; *Leaver v. Gauss*, 62 Iowa, 314.

5 *Sharp v. Hall*, 86 Ala. 110, 11 Am. St. Rep. 28; *Simon v. Wildt*, 84 Ky. 157; *Carlton v. Cameron*, 54 Tex. 72, 38 Am. Rep. 620; *Estate of Cawley*, 136 Pa. St. 628.

6 *Ducker v. Burnham*, 146 Ill. 9, 37 Am. St. Rep. 135; *Kellett v. Shepard*, 139 Ill. 433.

7 *Warner v. Willard*, 54 Conn. 472; *Johnson v. Brasington*, 156 N. Y. 181; *Succession of Allen*, 48 La. Ann. 1036, 55 Am. St. Rep. 295.

8 *Peckham v. Lego*, 57 Conn. 553, 14 Am. St. Rep. 130.

9 *Parrott v. Avery*, 159 Mass. 594, 38 Am. St. Rep. 465.

### § 342b. Same—Words and Phrases.

General words in a will, following after and coupled with words of limited signification, are restricted to the same class of things as the former, except where such general words are in a

residuary clause.<sup>1</sup> The technical meaning of the term "devise" in a will is usually to pass realty as realty, but this meaning cannot prevail when such use of the word is negated by other words in the will clearly indicating a different and contrary intention.<sup>2</sup> The word "relations," used in wills, is ordinarily construed as including relatives by consanguinity, and excluding relatives by affinity, unless a contrary intention is manifested.<sup>3</sup> A devise in clear and absolute language, without words of limitation, cannot be defeated or limited by a subsequent doubtful provision in the will, inferentially raising a limitation upon the prior devise.<sup>4</sup> In case of a devise to one in express terms for life, and then over, without words to indicate the extent of the devise over, the latter devise carries a fee.<sup>5</sup> The words "heirs at law," "legal heirs," "heirs of body," or kindred terms, used in a devise betokening a devise to such as a class, to take effect at a particular time, entitle such parties to take as purchasers, and not by descent. In such case, the distribution will be per stirpes, unless the devise otherwise directs.<sup>6</sup> The husband is not the "heir or next of kin" of the wife, within the ordinary meaning of a will;<sup>7</sup> nor, within such meaning, is a widow the "heir" of her husband.<sup>8</sup> The words "die without issue of his body lawfully begotten," in a will, is to be construed to mean a definite failure of issue, and will support a limitation over, if other words in

the will do not prevent this result.<sup>9</sup> When necessary to carry out the manifest intention of the testator, a direction in a will that upon certain contingencies property shall be divided between "their children" will be changed so as to read "my children."<sup>10</sup> A devise to several equally, and when either dies his share to be divided among the rest, vests the property in the devisees as tenants in common, with cross-remainders between them, and the ultimate limitation to the last survivor.<sup>11</sup> If an estate be devised to two, and the part given to one fails from any cause, that part, without an express and fresh disposition of it, will not go in augmentation of the part given to the other, but will fall into the residue, or go to the next of kin.<sup>12</sup> Courts are not inclined to regard a will as conditional, if it can be reasonably held that the maker was simply expressing his inducement to make it;<sup>13</sup> and they are especially averse to construing conditions to be precedent, where they may defeat the vesting of an estate by will.<sup>14</sup> A power of sale given in a will should be liberally construed in order to effect the purpose and intent of the will.<sup>15</sup> But a testamentary power of sale does not give power to make partition;<sup>16</sup> nor power to mortgage.<sup>17</sup> But power to "sell, exchange, and dispose" of the estate was held to include the power to mortgage.<sup>18</sup>

1 *Peaslee v. Fletcher*, 60 Vt. 188, 6 Am. St. Rep. 103; *Succession of Allen*, 48 La. Ann. 1036, 55 Am. St. Rep. 295.

2 *Clarke v. Clarke*, 46 S. C. 230, 57 Am. St. Rep. 675. As to whether a devise is specific, see *McFadden v. Hefley*, 28 S. C. 317, 13 Am. St. Rep. 675.

3 *Bennett v. Van Riper*, 47 N. J. Eq. 563, 24 Am. St. Rep. 416; and see *Cleaver v. Cleaver*, 39 Wis. 96, 20 Am. Rep. 30.

4 *Bills v. Bills*, 80 Iowa, 269, 20 Am. St. Rep. 418; and see *Good v. Fichthorn*, 144 Pa. St. 287, 27 Am. St. Rep. 630; *Foose v. Whitmore*, 82 N. Y. 405, 37 Am. Rep. 572; *Goodwin v. Coddington*, 154 N. Y. 283; *Campbell v. Beaumont*, 91 N. Y. 465; *Stowell v. Hastings*, 59 Vt. 494, 59 Am. Rep. 748; *Banzer v. Banzer*, 156 N. Y. 429.

5 *White v. Crenshaw*, 5 Mackey, 113, 60 Am. Rep. 370.

6 *Dukes v. Faulk*, 37 S. C. 255, 34 Am. St. Rep. 745. Compare *Kelley v. Vigas*, 54 Am. Rep. 235; and see *Bethea v. Bethea*, 116 Ala. 265.

7 *Ivins' Appeal*, 106 Pa. St. 176, 51 Am. Rep. 516; *Wilkins v. Ordway*, 59 N. H. 378, 47 Am. Rep. 215.

8 *Dodges' Appeal*, 106 Pa. St. 216, 51 Am. Rep. 519; *Ruggles v. Randall*, 70 Conn. 44. Compare *Tillman v. Davis*, 95 N. Y. 17, 47 Am. Rep. 1.

9 *Combs v. Combs*, 67 Md. 11, 1 Am. St. Rep. 359. See *Vanderzee v. Slingerland*, 103 N. Y. 47, 57 Am. Rep. 701; *McCormick v. McElligott*, 127 Pa. St. 230, 14 Am. St. Rep. 837.

10 *Slingluff v. Johns*, 87 Md. 273.

11 *Reber v. Dowling*, 65 Miss. 259, 7 Am. St. Rep. 651. See *Durfee v. MacNeil*, 58 Ohio St. 238.

12 2 *Jarman on Wills*, 368; *Sturgis v. Work*, 122 Ind. 134, 17 Am. St. Rep. 349.

13 *Likefield v. Likefield*, 82 Ky. 589, 56 Am. Rep. 908.

14 In re *Stickney's Will*, 85 Md. 79, 60 Am. St. Rep. 308; *Pennington v. Pennington*, 70 Md. 418.

15 *Geiger v. Kaigler*, 15 S. C. 262; *Wilkinson v. Buist*, 124 Pa. St. 253, 10 Am. St. Rep. 580; *Cotton v. Burkelman*, 142 N. Y. 160, 40 Am. St. Rep. 584.

16 Carr, Petitioner, 16 R. I. 645, 27 Am. St. Rep. 773.

17 Price v. Courtney, 87 Mo. 387, 56 Am. Rep. 453; Wilson v. Life Ins. Co., 60 Md. 150.

18 Faulk v. Dashiell, 62 Tex. 642, 50 Am. Rep. 542; and see Stiefel v. Clark, 9 Baxt. 466; Starr v. Moulton, 97 Ill. 525; Loebenthal v. Raleigh, 36 N. J. Eq. 169.

### § 343. Inconsistent Clauses.

If two provisions in a will are totally inconsistent and irreconcilable, so that both cannot stand, the rule as apparently settled is that the later shall prevail.<sup>1</sup> But every effort should be made to reconcile the conflicting clauses before rejecting either.<sup>2</sup> Repugnant words, in whatever portion of a will they occur, which contravenes the evident general purposes and intention of the testator as clearly expressed, may be rejected or transposed, or limited and controlled by other and prior provisions, and by the general purpose and intent thus clearly manifested.<sup>3</sup> If the same tract of land is devised in two different clauses of a will to different persons, such clauses are not regarded as repugnant, but are treated as manifesting an intention that the devisees shall hold as cotenants.<sup>4</sup> Provisions of a codicil, inconsistent with those in a will, take precedence over the latter.<sup>5</sup>

1 Sims v. Doughty, 5 Ves. 243; 6 Ves. 102; Bradstreet v. Clark, 12 Wend. 602; Fraser v. Boone, 1 Hill Ch. 367, 27 Am. Dec. 422; Pierce v. Ridley, 1 Baxt. 145, 25 Am. Rep. 769; Deering v. Adams, 37 Me. 264; Murfitt v. Jessop, 94 Ill. 158; Brownfield v. Wilson, 78 Ill.

16, ante; *Foster v. Stewart*, 18 Pa. St. 23; *Wheeler v. Dunlap*, 13 B. Mon. 291; *Barnes v. Patch*, 8 Ves. 604.

7 *Morrison v. Hoppe*, 15 Jur. 737; 5 Eng. L. & Eq. 199; and see *Den v. Payne*, 5 Hayw. 104.

8 *Huxstep v. Brooman*, 1 Bro. C. C. 437. See, also, *Pitman v. Stevens*, 15 East, 505; *Dewey v. Morgan*, 18 Pick. 295; sec. 332, ante.

9 *Rosetter v. Simmons*, 6 Serg. & R. 452.

10 *Kerry v. Derrick*, Cro. Jac. 104; *Anderson v. Greble*, 1 Ashm. 136; *Davis v. Williams*, 85 Tenn. 648; *Johnson v. Johnson*, 92 Tenn. 559, 36 Am. St. Rep. 104; *Carpenter v. Van Olinder*, 127 Ill. 42, 11 Am. St. Rep. 92.

11 *Doe v. Tofield*, 11 East, 246. The words "give, devise, and bequeath" pass an estate of inheritance in lands in Pennsylvania: *Kane's Estate*, 11 Phila. 72.

12 *Hardacre v. Nash*, 5 Term Rep. 716; *Newkerk v. Newkerk*, 2 Caines, 345.

13 *Neilson v. Neilson*, 6 Paige, 106.

14 *Doe v. Roe*, 12 Wend. 578; and see *Emmert v. Hays*, 89 Ill. 11; *Evens v. Griscom*, 42 N. J. L. 579; *Whitcomb v. Rodman*, 156 Ill. 116, 47 Am. St. Rep. 181; *Huffman v. Young*, 170 Ill. 290; *Slingsby v. Grainger*, 7 H. L. Cas. 273, 282.

15 *Philips v. Hele*, 1 R. M. Charlt. 101; 3 *Greenleaf's Cruise on Real Property*, 261, 262.

16 *Moreland v. Brady*, 8 Or. 303, 34 Am. Rep. 581; *Portland Trust Co. v. Beatie*, 32 Or. 305.

17 *Vandiver v. Vandiver*, 115 Ala. 328.

### § 345. Description of Devisee.

As it respects the description of devisees, it is enough if the words sufficiently denote the persons intended by the testator, distinguishing them from all other persons.<sup>1</sup> A devise is to be liberally expounded in favor of the devisee;<sup>2</sup> and the cases are numerous in which persons have been let in as devisees, although they were not within

the precise terms of the will.<sup>3</sup> A devise to Margaret, daughter of A., was held to be good as a devise to her, although her name was Margery.<sup>4</sup> Under a devise to William P., eldest son of Charles P. of T., who had an eldest son but his name was Andrew, it was held that Andrew was entitled to take.<sup>5</sup> A nickname or a name by reputation given by the testator sufficiently designates the devisee.<sup>6</sup> And a bastard may take under a devise to him by a name gained by reputation.<sup>7</sup> The word "children" in a will must be understood in its primary sense and simple signification when that can be done;<sup>8</sup> and if there is nothing in the will to show that the testator intended to use the word in a different sense, it will not be held to include illegitimate offspring, stepchildren, children by marriage only, grandchildren, or more remote descendants.<sup>9</sup> The word "issue" embraces both children and grandchildren;<sup>10</sup> but the whole context of the will must be taken into consideration, and the word will be held to mean children, upon a slight indication that such was the testator's intent.<sup>11</sup> The word "descendants" is a good term of description, and includes all who proceed from the body of the person named.<sup>12</sup> A devise to a person by the designation of "heir" is void, unless it is shown by the will that heir apparent was intended.<sup>13</sup> The word "relations" and "family" will be understood to mean "next of kin," unless the context requires a different interpreta-



tion.<sup>14</sup> The words "nearest relation" in a will are to be taken collectively, as much as kindred or heir, and do not mean some single person.<sup>15</sup>

1 Rivers' Case, 1 Atk. 410; Bate v. Amherst, T. Raym. 82; Doe v. Hallett, 1 Maule & S. 124; and see Adams v. Jones, 16 Jur. 159; 9 Eng. L. & Eq. 269; Bernasconi v. Atkinson, 23 L. J., N. S., 184; 23 Eng. L. & Eq. 207; Gardner v. Hyer, 2 Paige, 11; Cheney v. Selman, 71 Ga. 384; Dennis v. Holsapple, 148 Ind. 297, 62 Am. St. Rep. 526. Validity of devise to nonexisting corporation: See Tilden v. Green, 130 N. Y. 29, 27 Am. St. Rep. 487.

2 See sec. 343, ante; Carter v. Balfour, 19 Ala. 814; Voorhees v. Voorhees, 6 N. J. Eq. 1.

3 See Royle v. Hamilton, 4 Ves. 439; Barnasconi v. Atkinson, 23 L. J., N. S., 184; 23 Eng. L. & Eq. 207; Izard v. Izard, 2 Desaus. 303; Havergal v. Harrison, 7 Beav. 49.

4 Gynes v. Kemsley, 1 Freem. 293.

5 Pitcairne v. Brase, Finch, 403; and see Doe v. Huthwaite, 3 Barn. & Ald. 632.

6 Ryers v. Wheeler, 22 Wend. 150; and see Beaumont v. Fell, 2 P. Wms. 141.

7 Swaine v. Kennerley, 1 Ves. & B. 469; Wilkinson v. Adam, 1 Ves. & B. 422; Rivers' Case, 1 Atk. 410.

8 Palmer v. Horn, 84 N. Y. 516.

9 Ward v. Sutton, 5 Ired. Eq. 421; Cramer v. Pinckney, 3 Barb. Ch. 475; Hughes v. Hughes, 12 B. Mon. 115; Mowatt v. Carow, 7 Paige, 328, 32 Am. Dec. 641; Collins v. Hoxie, 9 Paige, 88; Van Voorhis v. Brintnall, 23 Hun, 260; Castner's Appeal, 88 Pa. St. 478. So, to same effect, Cummings v. Plummer, 94 Ind. 403, 48 Am. Rep. 167; Chapin v. Crow, 147 Ill. 219, 37 Am. St. Rep. 213; Mefford v. Dougherty, 89 Ky. 58, 25 Am. St. Rep. 521; Estate of Chapoton, 104 Mich. 11, 53 Am. St. Rep. 454.

10 Kingsland v. Rapelye, 3 Edw. Ch. 1; and see Merest v. James, 1 Brod. & B. 484; Luddington v. Kime, 1 Ld. Raym. 205; Minter v. Wraith, 13 Sim. 52; Pope v. Pope, 21 L. J. Ch., N. S., 276; 9 Eng. L. & Eq. 193; Williams v. Teale, 6 Hare, 239; Womrath v. McCormick, 51 Pa. St. 504.

11 *Palmer v. Horn*, 84 N. Y. 516; *Pruen v. Osborne*, 11 Sim. 132; *Voller v. Carter*, 28 Eng. L. & Eq. 267; *Jackson v. Merrill*, 6 Johns. 185, 5 Am. Dec. 213.

12 *Crossly v. Clare*, Amb. 397. See *Beals v. Crisford*, 13 Sim. 592; *Styth v. Monroe*, 6 Sim. 49; *Mowatt v. Carow*, 7 Paige, 328, 32 Am. Dec. 641.

13 *Heard v. Horton*, 1 Denio, 165; *Burchett v. Durdant*, 2 Vent. 311. Compare *Smith v. Folwell*, 1 Binn. 546; *Daly v. James*, 8 Wheat. 495; *Fiske v. Keene*, 35 Me. 349; *Bowes v. Porter*, 4 Pick. 198.

14 *Grant v. Lyman*, 4 Russ. 292. A devise to A and family is to A and his wife and children: *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302. Compare *Pigg v. Clark*, L. R. 3 Ch. Div. 672; and see sec. 342b, ante.

15 3 *Greenleaf's Cruise on Real Property*, 222; *Pyot v. Pyot*, 1 Ves. 335. See *Doe v. Over*, 1 Taunt. 263.

### § 345a. Same—Continued.

A misnomer of a corporation in a devise will not operate to defeat the same, when it is made to appear what particular corporation was designed to take by the testator.<sup>1</sup> The word “children,” in a will, is generally a word of purchase, and not of limitation. And while the word may be used to signify heirs, or heirs of the body, it will not be so construed, unless the testator has employed other words indicative of an intention to use it as a word of limitation.<sup>2</sup> It will be construed to include grandchildren, stepchildren, illegitimate children, or descendants, however remote, where there are no immediate children to whom the term can apply, or where it is manifest from other words in the will that it was used in the broad sense of issue or descendants.<sup>3</sup> The word “issue,” in a will, without any qualifying

words or circumstances, comprehends all persons in the line of descent from the ancestor, and has the same meaning as “descendants.”<sup>4</sup> It includes all descendants in being at the time the terms of the will become operative.<sup>5</sup> And a devise to “the male issue then living of testator’s son” includes all male descendants of that son, then living, whether of the same generation or not, and whether tracing descent through males or through females.<sup>6</sup> If a testator uses the word “issue” in one part of his will as meaning children, it will be presumed that in using the same word in another part he intended it to have the same signification.<sup>7</sup>

1 Reilly v. Union etc. Infirmary, 87 Md. 664.

2 Oyster v. Knull, 137 Pa. St. 448, 21 Am. St. Rep. 890; Mercantile Bank v. Ballard, 83 Ky. 481, 4 Am. St. Rep. 160.

3 Will of Scholl, 100 Wis. 650; and see Hughes v. Niklas, 70 Md. 484, 14 Am. St. Rep. 377; Elliott v. Elliott, 117 Ind. 380, 10 Am. St. Rep. 54; Bowker v. Bowker, 148 Mass. 198; In re Schedel, 73 Cal. 594.

4 Soper v. Brown, 136 N. Y. 244, 32 Am. St. Rep. 731.

5 Pearce v. Rickard, 18 R. I. 142, 49 Am. St. Rep. 755, and note.

6 Wistar v. Scott, 105 Pa. St. 200, 51 Am. Rep. 197.

7 Madison v. Larmon, 170 Ill. 65, 62 Am. St. Rep. 356.

### § 345b. Same—Extrinsic Evidence in Aid of Construction.

Courts are not permitted to receive extrinsic evidence in order to add to, vary, or change the literal

meaning of the terms of a will, or to give effect to what may be supposed or presumed to have been the unexpressed intention of the testator.<sup>1</sup> But it is well settled that such evidence is admissible for the purpose of applying the terms or provisions of wills to the objects or subjects therein referred to, and in order to reach a correct interpretation of such language or terms as are therein expressed.<sup>2</sup> In case of latent ambiguity in a will, extrinsic evidence may be resorted to in order to determine the existence or nonexistence of such ambiguity, and to enable the court to look upon the will in the light of the facts and circumstances surrounding the testator at the time of its execution.<sup>3</sup>

1 *Tilden v. Green*, 130 N. Y. 29, 27 Am. St. Rep. 487; *Schlottman v. Hoffman*, 73 Miss. 128, 55 Am. St. Rep. 527; *Bingel v. Volz*, 142 Ill. 214, 34 Am. St. Rep. 64; *Clarke v. Clarke*, 46 S. C. 230, 57 Am. St. Rep. 675.

2 *Chappell v. Missionary Soc.*, 3 Ind. App. 356, 50 Am. St. Rep. 276; *Dennis v. Holsapple*, 148 Ind. 297, 62 Am. St. Rep. 526; *Patch v. White*, 117 U. S. 210.

3 *Decker v. Decker*, 121 Ill. 341; *Whitcomb v. Rodman*, 156 Ill. 116, 47 Am. St. Rep. 181; *Vandiver v. Vandiver*, 115 Ala. 328; *Succession of Ehrenberg*, 21 La. Ann. 280, 99 Am. Dec. 729; *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552.

### § 346. Devises to Charitable Uses.

It was formerly held in England, in consequence of the statute of 43 Elizabeth, chapter 4, called "the statute of charitable uses," that a devise to a corporation for a charitable use was valid,

as operating in the nature of an appointment.<sup>1</sup> But by statute of 9 George II, chapter 36, devises to charitable uses, with certain exceptions,<sup>2</sup> are rendered void.<sup>3</sup> In this country every corporation is competent to take and hold real estate by devise, unless expressly disqualified by statute;<sup>4</sup> and it has even been held that a devise to a voluntary unincorporated association may be valid.<sup>5</sup> And devises for purposes denominated "charitable" are such favorites with our courts that all instruments where they are concerned are liberally construed, in order that they may be sustained.<sup>6</sup> Although great uncertainty may exist as it respects the persons or objects of the devise, yet the court will execute it as nearly as it can.<sup>7</sup> The devise will not be defeated if the intended object thereof can be identified.<sup>8</sup>

1 3 Greenleaf's Cruise on Real Property, 22. See Attorney General v. Brenton, 2 Ves. 425; Attorney General v. Mayor etc., 1 Bligh, N. S., 347; Grimes v. Harmon, 35 Ind. 198, 9 Am. Dec. 690; Shotwell v. Mott, 2 Sand. Ch. 45.

2 See Attorney General v. Goddard, 1 Turn. & R. 348; Attorney General v. Tancred, 3 Ves. 641; Holland v. Alcock, 108 N. Y. 312, 2 Am. St. Rep. 420.

3 3 Greenleaf's Cruise on Real Property, 22; Corbyn v. French, 4 Ves. 427; Attorney General v. Weymouth, Amb. 20; Finch v. Squire, 10 Ves. 41.

4 Boone on Corporations, sec. 53.

5 Boone on Corporations, sec. 327; and see Crum's Appeal, 66 Pa. St. 474; sec. 329, ante.

6 Adye v. Smith, 44 Conn. 60, 26 Am. Rep. 424; Brown v. Kelsey, 2 Cush. 243; Ould v. Washington Hospital, 95 U. S. 303; Girard v. Philadelphia, 7 Wall. 1;

**Preachers' Aid Soc. v. Rich**, 45 Me. 552; **Power v. Cassidy**, 79 N. Y. 602, 35 Am. Rep. 550; **Simpson v. Welcome**, 72 Me. 496, 39 Am. Rep. 349; **Woodruff v. Marsh**, 63 Conn. 125, 38 Am. St. Rep. 346; **Rhymer's Appeal**, 93 Pa. St. 142, 39 Am. Rep. 736.

7 **Moggridge v. Thackwell**, 7 Ves. 36; **Dexter v. Gardner**, 7 Allen, 243; **Bliss v. American Bible Soc.**, 2 Allen, 334; **Crafton v. Frith**, 20 L. J. Ch., N. S., 198; 3 Eng. L. & Eq. 164; **Philadelphia v. Girard**, 45 Pa. St. 28, 84 Am. Dec. 470. Compare **Beekman v. Bonsor**, 23 N. Y. 298, 80 Am. Dec. 269; **Gilman v. Hamilton**, 16 Ill. 225; **Brown v. Concord**, 33 N. H. 285; **Holmes v. Mead**, 52 N. Y. 332; **Boone on Corporations**, sec. 340.

8 See **First Baptist Church v. Robberson**, 71 Mo. 326; **Miller v. Atkinson**, 63 N. C. 537; **Henser v. Harris**, 42 Ill. 425; **Nichols v. Allen**, 130 Mass. 211, 39 Am. Rep. 445.

### § 346a. Same—Continued.

A charity, briefly defined, is a gift to promote the welfare of others.<sup>1</sup> The statute of charitable uses (43 Eliz., c. 4), is a part of the common law in some of the states, and is considered in determining the general spirit and intent of the term "charitable," and the objects which are to be regarded as charitable.<sup>2</sup> But in other states this statute is not in force.<sup>3</sup> The English law of charitable uses does not prevail in New York, and the laws of that state governing such uses must be sought in its statutes and in its corporation laws, general and special.<sup>4</sup> Charitable uses are favored in equity, and will be supported when the trust would fail for uncertainty were it not for a charity.<sup>5</sup> The doctrine is maintained that a charity will always be upheld where it is created in favor

of a person having sufficient capacity to take as donee, or, if it be not direct to such person where it is definite in its object, lawful in its creation, and to be executed by trustees.<sup>6</sup> It is sufficient to create a charitable use if it appears from the construction of the instrument that the property was intended to be held subject only to the execution of certain charitable trusts or the performance of certain conditions in favor of charity.<sup>7</sup> The fact that the charity would be administered in a foreign country does not of itself render the gift void.<sup>8</sup> And the rule against perpetuities has no application to gifts for charitable uses.<sup>9</sup> A devise of real estate to a charitable use, with a direction that no part thereof should at any time be alienated, does not create a perpetuity in the sense forbidden by law, but only a perpetuity allowed by law and equity in the cases of charitable trusts.<sup>10</sup> An unincorporated association is capable of taking and holding land as a devise for a charitable use.<sup>11</sup> In England, if a charitable trust were not sufficiently definite to admit of its practical application, courts of equity would order a reference to a master in chancery to devise a scheme for its administration, which should, as nearly as possible, conform to the intentions of its founder, and thus was called into operation what was known as the *cy pres* doctrine.<sup>12</sup> The doctrine of *cy pres* has been adopted in whole or in part in a number of the states,<sup>13</sup> while in other

states the doctrine is rejected.<sup>14</sup> The doctrine is said to be a simple rule of judicial construction designed to aid the court to ascertain and carry out, as nearly as may be, the true intention of the donor.<sup>15</sup> If it appears from the will that the intention of the testator was that his property should be applied to a charitable purpose whose general nature is described so that a general charitable intent can be inferred, then if, by a change of circumstances or in the law, it becomes impracticable to administer the trust in the precise manner provided by the testator, the doctrine of cy pres will be applied in order that the general charitable intent which the court regards as the dominant one may not be altogether defeated.<sup>16</sup> If, however, the charitable purpose is limited to a particular object or to a particular institution, and there is no general charitable intent, then, if it becomes impossible to carry out the object, or the institution ceases to exist before the gift has taken effect, the doctrine of cy pres does not apply, and, in the absence of any limitation over, or other provision, the legacy lapses.<sup>17</sup> A gift by will to a supposititious and nonexistent corporation, by name, is not a public charity, and cannot be claimed by another incorporated institution of nearly similar name and nature, under the doctrine of cy pres.<sup>18</sup>

<sup>1</sup> *Philadelphia v. Masonic Home*, 160 Pa. St. 572, 40 Am. St. Rep. 736. See, for more extended definitions,



**Jackson v. Phillips**, 14 Allen, 539; **Hoeffer v. Clogan**, 171 Ill. 462, 63 Am. St. Rep. 241, and note.

2 See **Hoeffer v. Clogan**, 171 Ill. 462, 63 Am. St. Rep. 241; **Adye v. Smith**, 44 Conn. 60, 26 Am. Rep. 424; **Webster v. Wiggin**, 19 R. I. 73; **Bates v. Bates**, 134 Mass. 110, 45 Am. Rep. 305; **Simpson v. Welcome**, 72 Me. 496, 39 Am. Rep. 349.

3 See **Protestant etc. Soc. v. Churchman**, 80 Va. 718; **Erschine v. Whitehead**, 84 Ind. 357; **Heiss v. Murphy**, 40 Wis. 276; **Halsey v. Convention**, 75 Md. 275. It is in force in a qualified sense in Alabama: **Festorazzi v. St. Joseph's Church**, 104 Ala. 327, 53 Am. St. Rep. 48.

4 **Holland v. Alcock**, 108 N. Y. 312, 2 Am. St. Rep. 420.

5 **Heiskell v. Chickasaw Lodge**, 87 Tenn. 668; **Woodruff v. Marsh**, 63 Conn. 125, 38 Am. St. Rep. 346.

6 **Cobb v. Denton**, 6 Baxt. 235; **American Tract Soc. v. Atwater**, 30 Ohio St. 77, 27 Am. Rep. 422; **Johnson v. Johnson**, 92 Tenn. 559, 36 Am. St. Rep. 104.

7 **Mills v. Davison**, 54 N. J. Eq. 659, 55 Am. St. Rep. 594.

8 **Fellows v. Miner**, 119 Mass. 541; **Teele v. Bishop of Derry**, 168 Mass. 341, 60 Am. St. Rep. 401.

9 **Mills v. Davison**, 54 N. J. Eq. 659, 55 Am. St. Rep. 594; **Philadelphia v. Girard**, 45 Pa. St. 9, 84 Am. Dec. 470; **Estate of Hinckley**, 58 Cal. 457; **Estate of Robinson**, 63 Cal. 621.

10 **Perin v. Carey**, 24 How. 465; and see, also, **Seaver v. Fitzgerald**, 141 Mass. 401; **Ould v. Washington Hospital**, 1 McAr. 541, 29 Am. Rep. 605; **Jones v. Habersham**, 107 U. S. 174; sec. 346, ante.

11 **Bates v. Taylor**, 28 S. C. 476; **Dye v. Beaver Creek Church**, 48 S. C. 444, 59 Am. St. Rep. 724; **Tilden v. Green**, 130 N. Y. 29, 27 Am. St. Rep. 487. Compare **Stratton v. Physio-Medical College**, 149 Mass. 505, 14 Am. St. Rep. 442; **White v. Rice**, 112 Mich. 403.

12 See **Jackson v. Phillips**, 14 Allen, 539; **Holland v. Alcock**, 108 N. Y. 312, 2 Am. St. Rep. 420.

13 See **Rhode Island etc. Trust Co. v. Olney**, 14 R. I. 449; **Estate of Hinckley**, 58 Cal. 457; **Barkley v. Donnelly**, 112 Mo. 561; **Adams Female Academy v. Adams**, 65 N. H. 225; **Kinney v. Kinney**, 86 Ky. 610.

14 See *Doughten v. Vandever*, 5 Del. Ch. 51; *People v. Powers*, 147 N. Y. 109; *Fuller's Will*, 75 Wis. 431; *Johnson v. Holifield*, 79 Ala. 423, 58 Am. Rep. 596; *Johnson v. Johnson*, 92 Tenn. 559, 36 Am. St. Rep. 104.

15 *Jackson v. Phillips*, 14 Allen, 539; *Doyle v. Whalen*, 87 Me. 414.

16 *Teele v. Bishop of Derry*, 168 Mass. 341, 60 Am. St. Rep. 401; *Attorney General v. Briggs*, 164 Mass. 561; *Sears v. Chapman*, 158 Mass. 400, 35 Am. St. Rep. 502; and see, to same effect, *Church of Jesus Christ v. United States*, 136 U. S. 1; *In re Campden Charities*, L. R. 18 Ch. Div. 310; *In re Slevin* (1891), 2 Ch. 236.

17 *Teele v. Bishop of Derry*, 168 Mass. 341, 60 Am. St. Rep. 401; *Bullard v. Shirley*, 153 Mass. 559; *In re Ovey*, L. R. 29 Ch. Div. 560; *In re White's Trusts*, L. R. 33 Ch. Div. 449; *In re Rymer* (1895), 1 Ch. 19.

18 *Stratton v. Physio-Medical College*, 149 Mass. 505, 14 Am. St. Rep. 442. Charitable uses which will be upheld by the courts: See *Mannix v. Purcell*, 46 Ohio St. 102, 15 Am. St. Rep. 562; *George v. Braddock*, 45 N. J. Eq. 757, 14 Am. St. Rep. 754; *Quinn v. Shields*, 62 Iowa, 129, 49 Am. Rep. 141; *Hoeffer v. Clogan*, 171 Ill. 462, 63 Am. St. Rep. 241.

### § 347. Lapsed Devise.

A lapse is a failure of the devise by the death of the devisee in the lifetime of the testator.<sup>1</sup> And by the rule of the English law, although the devise be to A and his heirs, yet if A dies before the testator, his heirs will not take anything by the devise, the word "heirs" being used only as a word of limitation to denote the quantity of estate given, and not to describe the heirs of A, or to give them anything.<sup>2</sup> But an English statute has altered this rule of law, by a provision that if the devisee dies in the lifetime of the testator, leaving issue alive at the testator's death, the de-

visé does not lapse, unless a contrary intent appears in the will.<sup>3</sup> And similar statutory provisions have been enacted in many of the states of the Union.<sup>4</sup> But if the devisee dies, leaving no issue alive at the death of the testator, the devise lapses by the common law.<sup>5</sup> In case of a devise to several in succession, and the first devisee refuses, or is incapacitated to take, the devise does not lapse, but passes to the next in succession.<sup>6</sup> An interest which has lapsed by the death of the devisee, in the lifetime of the testator, descends to the heir at law of the testator, notwithstanding a general residuary devise contained in the will.<sup>7</sup> An estate devised upon a trust does not lapse by the death of the trustees in the lifetime of the testator.<sup>8</sup> But land devised upon a trust which is void, as tending to create a perpetuity, descends to the heir.<sup>9</sup>

1 Burton on Real Property, sec. 275; 3 Greenleaf's Cruise on Real Property, 162. See *Andrew v. Bible Soc.*, 4 Sand. 156; *Moffett v. Elmendorf*, 152 N. Y. 475, 57 Am. St. Rep. 529, and note.

2 *Brett v. Rygden*, Plow. 341; *Hutton v. Simpson*, 2 Vern. 722; *Busby v. Greenslate*, 1 Strange, 445; *Warner v. White*, 3 Brown P. C. 435; and see *Anderson v. Parsons*, 4 Me. 486; *Strong v. Ready*, 9 Humph. 168; *Fisher v. Hill*, 7 Mass. 86; *Gore v. Stephens*, 1 Dana, 203. The words "and to his heirs forever," in a devise, do not pass any estate to the heirs of a devisee, unless from the whole will it was clearly the intent of the testator: *Rhodes v. June*, 15 N. Y. Week. Dig. 326; *Gill v. Bronwer*, 37 N. Y. 549; *Thurber v. Chambers*, 66 N. Y. 42.

3 Stat. 1 Vict., c. 26, sec. 33. See *Griffiths v. Gale*, 12 Sim. 354; *Johnson v. Johnson*, 3 Hare, 157.

4 See, as to the statute of Pennsylvania: *Martindale v. Warner*, 15 Pa. St. 471; California: Cal. Civ. Code, sec. 1310. A wife is not a relation of her "husband" within a statute saving from lapse a devise to a "child or other relation" of the testator's, who dies before the testator: *Cleaver v. Cleaver*, 30 Wis. 96, 20 Am. Rep. 30.

5 *Ballard v. Ballard*, 18 Pick. 41.

6 *De Kay v. Irving*, 5 Denio, 646; *Yeaton v. Roberts*, 28 N. H. 459; *Perry v. Logan*, 5 Rich. 202.

7 *Doe v. Underdown*, Willes, 293; *Brewster v. McCall*, 15 Conn. 274; *Ferguson v. Hedges*, 1 Harr. (Del.) 524; *Hayden v. Stoughton*, 5 Pick. 528; *Greene v. Dennis*, 6 Conn. 293, 16 Am. Dec. 58.

8 *Attorney General v. Downing*, Amb. 571.

9 *Hillyard v. Miller*, 10 Pa. St. 326.

### § 347a. Antemortem Probate of Will.

*Nemo est haeres viventis*, is an established maxim of the law. And a statute that provides for the probate of a will before the testator's death, and leaves him at liberty to revoke or alter it, or by removal from the jurisdiction to escape the effect of any action under it, is inoperative and void.<sup>1</sup>

1 *Lloyd v. Wayne Circuit Judge*, 56 Mich. 236, 56 Am. Rep. 378; and see *In re Davis' Will*, 120 N. C. 9, 58 Am. St. Rep. 771.

### § 347b. Probate of Lost or Destroyed Will.

A court of probate, unless forbidden to do so by a statute, may admit to probate a will which has been lost, suppressed, or destroyed, or such a will may be established by a court of equity.<sup>1</sup>

1 *Dower v. Seeds*, 28 W. Va. 113, 57 Am. Rep. 646.

**§ 347c. Construction, Rights of Devisees, etc.**

In case of a general devise of money, stocks, or bonds to one for life, with remainder over, the life tenant is not entitled to possession, but the executor retains it, the life tenant getting the income. But this rule of construction must be disregarded where, from the whole will, it appears that it was the intention of the testator that the life tenant should have possession of the thing devised, and in the latter event the intention of the testator must control.<sup>1</sup> In common understanding, the devisee of an estate in fee simple absolute "receives" it at the moment of the testator's death, although the enjoyment may be postponed to a future time.<sup>2</sup> Where three contiguous tracts of land, all subject to the same oil and gas lease, are devised respectively to the owner's three children, the royalties accruing under the lease are divisible among the three devisees in proportion to the acreage held by each, although the oil is produced from wells sunk on one of the tracts only.<sup>3</sup> Election under a will consists in the exercise of a choice offered the devisee of accepting the devise and surrendering some right of his which the will undertakes to dispose of, or of retaining such right and rejecting the devise. The party electing to take under the will is bound to give effect to all of its provisions, and perform the burdens attached to his benefit.<sup>4</sup> A devisee who takes a vested remainder subject to

the performance of a condition subsequent does not forfeit his interest by noncompliance with that condition, unless such noncompliance was the result of his own fault.<sup>5</sup> General laws enacted for the devolution of property by will or descent are held not to operate in favor of one who murdered his ancestor or benefactor in order to speedily come into possession of his estate, either as devisee, legatee, or heir at law.<sup>6</sup> A debt of a devisee to the testator cannot be charged on lands devised to him by the testator, in the absence of language in the will making such debt a charge.<sup>7</sup> An executor has no power to dispose of lands by virtue of his office, and the owner whether devisee or otherwise, is in no way affected by his action, which is void for all purposes.<sup>8</sup>

1 *Watkins v. Swadon*, 93 Ky. 501, 40 Am. St. Rep. 203.

2 *Johnes v. Beers*, 57 Conn. 295, 14 Am. St. Rep. 101.

3 *Wettengel v. Gormley*, 160 Pa. St. 559, 40 Am. St. Rep. 733.

4 *Moore v. Baker*, 4 Ind. App. 115, 51 Am. St. Rep. 203, and note.

5 *Bryant v. Dungan*, 92 Ky. 627, 36 Am. St. Rep. 618, and note.

6 *Riggs v. Palmer*, 115 N. Y. 506, 12 Am. St. Rep. 819.

7 *La Foy v. La Foy*, 43 N. J. Eq. 206, 3 Am. St. Rep. 302. See sec. 275, ante.

8 *Frost v. Atwood*, 73 Mich. 67, 16 Am. St. Rep. 560.

**§ 347d. Equitable Conversion.**

Equitable conversion is held to result from the existence of a power to convert realty into personalty, or personalty into realty, which has not been exercised. There must be both the grant of a power and the imposition of a duty to make use of it.<sup>1</sup> It is that change in property by which, for certain purposes, real estate is considered as personal, and personal as real, and transmissible and descendible as such, and there must be an absolute intention and direction that the conversion is to be made, in order to create it. It is not essential, however, that an express declaration to that effect be made in the instrument, but it may arise by necessary implication from the nature of the instrument or the language employed.<sup>2</sup> If a testator uses such words as "invest" and "pay over" in his will, thus conveying the idea that the entire estate, both real and personal, is to be distributed as personalty, his executor is authorized to convert the real estate into personalty, though no such direct authority is contained in the will.<sup>3</sup> Persons benefited by the equitable conversion of real property into personalty by will may elect to have a reconversion into realty, and take it as land, rather than the proceeds of it.<sup>4</sup> The question whether the language of a will works an equitable conversion of realty into personalty is one to be determined by the courts of the testator's domicile, in so far as the

land in that state is concerned.<sup>5</sup> Notwithstanding executors are directed to sell real property and convert it into money, and actually make such sale, the proceeds are not thereby converted into personalty, if the purpose for which the sale was directed to be made is one not permitted by law, and the moneys so realized belong to the heir at law.<sup>6</sup> And if the purposes of a conversion have utterly failed, the property will devolve according to its original character.<sup>7</sup>

1 Clarke's Appeal, 70 Conn. 195, 213; and so, to same effect, Ducker v. Burnham, 146 Ill. 9, 37 Am. St. Rep. 135; Fahnestock v. Fahnestock, 152 Pa. St. 56, 34 Am. St. Rep. 623.

2 Haward v. Peavey, 128 Ill. 430, 15 Am. St. Rep. 120; Farmer v. Spell, 11 Rich. Eq. 547.

3 Clarke v. Clarke, 46 S. C. 230, 57 Am. St. Rep. 675. See, further, as to conversion of real property into personalty by will, Crittenden v. Fairchild, 41 N. Y. 289; Greenland v. Waddell, 116 N. Y. 234, 15 Am. St. Rep. 400; Compton v. McMahan, 19 Mo. App. 494; Beadle v. Beadle, 2 McCrary, 586; Eneberg v. Carter, 98 Mo. 647, 14 Am. St. Rep. 664.

4 Greenland v. Waddell, 116 N. Y. 234, 15 Am. St. Rep. 400; and see Prentice v. Janssen, 79 N. Y. 478; Armstrong v. McKelvey, 104 N. Y. 179.

5 Clarke's Appeal, 70 Conn. 195. See sec. 327, ante.

6 Fifield v. Van Wyck, 94 Va. 557, 64 Am. St. Rep. 745; and see Gallagher v. Rowan, 86 Va. 823; Bective v. Hodgson, 10 H. L. Cas. 656.

7 Bispham's Equity, sec. 315; Rudy's Estate, 185 Pa. St. 359, 64 Am. St. Rep. 654; King v. King, 13 R. I. 501.



## CHAPTER XXVII.

## JOINT ESTATES.

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### § 348. In General.

Real property owned by a single person is said to be held in severalty; that is, he holds it in his own right only, without any other person being joined with him in point of interest, during his estate therein.<sup>1</sup> Such property is usually held in this way, and therefore the general rules and doctrines respecting estates, nothing appearing to the contrary, are supposed to have reference to estates held in severalty.<sup>2</sup> But the title to real property is sometimes vested in two or more persons, and this has given rise to joint estates, three kinds of which are known to the common law, namely, estates in joint tenancy, in coparcenary, and in common.<sup>3</sup>

1 2 Blackstone's Commentaries, 179; 1 Greenleaf's Cruise on Real Property, 829.

2 2 Blackstone's Commentaries, 179.

3 2 Blackstone's Commentaries, 179; 1 Greenleaf's Cruise on Real Property, 828; 4 Kent's Commentaries, 357.

### § 349. Nature of a Joint Tenancy.

An estate in joint tenancy occurred, at common law, where lands or tenements were granted to

two or more persons, to hold in fee simple, fee tail, for life, for years, or at will.<sup>1</sup> And there may be also an estate of joint tenancy in remainder.<sup>2</sup> All the persons named in the instrument as grantees take a joint estate, and are called joint tenants.<sup>3</sup> An equal interest is created in all the persons who take under the grant;<sup>4</sup> and a grant which defines the interest which each is to take does not create a joint tenancy, but a tenancy in common.<sup>5</sup> For the purposes of tenure and survivorship, each joint tenant is the holder of the whole estate;<sup>6</sup> but for purposes of alienation, each has only his own share.<sup>7</sup> Prior to the abolition of tenures, title by joint tenancy was favored by the English law,<sup>8</sup> but since that time the title has been less favorably regarded by the courts;<sup>9</sup> and in this country it is the general statutory rule that every estate granted or devised to two or more persons is to be deemed a tenancy in common, unless a different tenure is clearly expressed or implied in the instrument creating the estate.<sup>10</sup> In some of the states, however, the case of joint trustees is specially excepted from the operation of the statutes, and the rules of the common law govern.<sup>11</sup>

1 2 Blackstone's Commentaries, 180; 1 Greenleaf's Cruise on Real Property, 829; *Martin v. Smith*, 5 Binn. 16, 6 Am. Dec. 395.

2 Coke on Littleton, 183b; 1 Greenleaf's Cruise on Real Property, 830; and see *Campbell v. Heron*, 1 Tayl. 199; *Wiggin v. Wiggin*, 43 N. H. 561.

3 Coke on Littleton, 277; 1 Greenleaf's Cruise on Real Property, 829.

4 Coke on Littleton, 180b; Coster v. Lorillard, 14 Wend. 336; Shiels v. Stark, 14 Ga. 429.

5 Craig v. Taylor, 6 B. Mon. 457.

6 Coster v. Lorillard, 14 Wend. 336.

7 1 Washburn on Real Property, 1st ed., 406; Williams on Real Property, \*132; and see Rector v. Waugh, 17 Mo. 13, 57 Am. Dec. 251.

8 See Williams on Real Property, \*132; Rigden v. Vallier, 3 Atk. 734; Martin v. Smith, 5 Binn. 16, 6 Am. Dec. 400; 4 Kent's Commentaries, 361.

9 Rigden v. Vallier, 3 Atk. 734; Fisher v. Wigg, 1 P. Wms. 14, note; and see Bambaugh v. Bambaugh, 11 Serg. & R. 191; Martin v. Smith, 5 Binn. 16, 6 Am. Dec. 395.

10 See 1 N. Y. Rev. Stats., sec. 44, p. 727; Miller v. Miller, 16 Mass. 59; Wiswall v. Wilkins, 5 Vt. 87; Nichols v. Denny, 37 Miss. 59; Evans v. Brittain, 3 Serg. & R. 135; Case v. Owen, 139 Ind. 22, 47 Am. St. Rep. 253; Thornburg v. Wiggins, 135 Ind. 178, 41 Am. St. Rep. 422; Mette v. Feltgen, 148 Ill. 357. An estate in joint tenancy is not known in Ohio: Wilson v. Fleming, 13 Ohio, 68, 82 Am. Dec. 434; Miles v. Fisher, 10 Ohio, 1, 36 Am. Dec. 61. And it is said not to exist in Connecticut: Phelps v. Jepson, 1 Root, 48, 1 Am. Dec. 33. But see Benedict v. Gaylord, 11 Conn. 337.

11 See 1 N. Y. Rev. Stats., sec. 44, p. 727; Parsons v. Boyd, 20 Ala. 112; Greer v. Blanchard, 40 Cal. 194; Webster v. Vandeventer, 6 Gray, 428. It is said that the principal use of a joint tenancy in England now is to vest estates in trustees: Williams on Real Property, 111.

### § 350. Joint Tenancy, How Created.

An estate in joint tenancy can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law.<sup>1</sup> And at common law, if an estate be granted to a plurality of persons, as, for instance, to A and B, and their heirs, without any restrictive, exclusive, or explan-

atory words, this makes them immediately joint tenants in fee of the lands.<sup>2</sup> But joint tenancies not being now favored, either at law or in equity,<sup>3</sup> the courts are inclined to seize upon any expression indicating an intention to give a separate interest to each.<sup>4</sup> And such a tenancy will never be inferred where a testator meant division.<sup>5</sup> A joint tenancy may be created as well by disseisin as by deed or devise, and joint disseisors may be joint tenants.<sup>6</sup> If an estate be given to several jointly, without any words indicating an intention that it shall be divided among them, it must be construed a joint tenancy.<sup>7</sup> And a grant of land to husband and wife "in joint tenancy" makes them joint tenants, and not tenants by the entireties therein.<sup>8</sup>

1 2 Blackstone's Commentaries, 180 Freeman on Co-tenancy, sec. 17. See McPherson v. Snowden, 19 Md. 230; Case v. Owen, 139 Ind. 22, 47 Am. St. Rep. 253.

2 2 Blackstone's Commentaries, 180; sec. 350, ante; and see Rigden v. Vallier, 3 Atk. 731; Dott v. Willson, 1 Bay, 457; Webster v. Vandeventer, 6 Gray, 428; Hannan v. Towers, 3 Har. & J. 147, 5 Am. Dec. 427; Whitridge v. Barry, 42 Md. 151; Gilbert v. Richards, 7 Vt. 208.

3 Sec. 350, ante.

4 Galbraith v. Galbraith, 3 Serg. & R. 392; Partridge v. Colegate, 3 Har. & McH. 399; Duncan v. Forrer, 6 Binn. 193.

5 Martin v. Smith, 5 Binn. 16, 16 Am. Dec. 395; Bagley v. Cook, 3 Drew. 662; Gordon v. Atkinson, 1 De Gex & S. 478; Hart v. Marks, 4 Bradf. 161; Robertson v. Fraser, L. R. 6 Ch. App. 699; Ryves v. Ryves, L. R. 11 Eq. 541.

6 Putney v. Dresser, 2 Met. 583; Allen v. Holton, 20 Pick. 458.

7 *Case v. Owen*, 139 Ind. 22, 47 Am. St. Rep. 253.

8 *Thornburg v. Wiggins*, 135 Ind. 178, 41 Am. St. Rep. 422. So, to same effect, *Fladung v. Rose*, 58 Md. 13; *Mette v. Feltgen*, 148 Ill. 357.

### § 351. Properties of Joint Tenancy.

The properties of an estate in joint tenancy are derived from its unity, viz., of interest, title, time, and possession; in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.<sup>1</sup> As it respects unity of interest, one joint tenant cannot be entitled to one period of duration or quantity of interest, and the other to a different one.<sup>2</sup> Thus, one cannot be tenant for life and the other for years, nor can one be tenant in fee and the other in tail;<sup>3</sup> but it is said that, if an estate be limited to two persons, and to the heirs of one of them, they are joint tenants for life.<sup>4</sup> Unity of title requires that the estate of joint tenants must be created by the same act or instrument, whether legal or illegal, as by one and the same grant, or by one and the same disseisin.<sup>5</sup> And unity of time requires that the estate be vested in all the joint tenants at the same period, as well as by the same title.<sup>6</sup> In respect to unity of possession, joint tenants are said to be seised per my et per tout; that is, each of them has the entire possession, as well of every part as of the whole.<sup>7</sup>

1 2 Blackstone's Commentaries, 180; 1 Greenleaf's Cruise on Real Property, 832, 833; Overton v. Lucy, 6 T. B. Mon. 13, 17 Am. Dec. 111; Case v. Owen, 139 Ind. 22, 47 Am. St. Rep. 253.

2 2 Blackstone's Commentaries, 181.

3 Coke on Littleton, 188.

4 1 Greenleaf's Cruise on Real Property, 831, 833. See Cray v. Willis, 2 P. Wms. 530.

5 2 Blackstone's Commentaries, 181.

6 Coke on Littleton, 188; 1 Greenleaf's Cruise on Real Property, 834; 2 Blackstone's Commentaries, 181.

7 2 Blackstone's Commentaries, 182; Overton v. Lucy, 6 T. B. Mon. 13, 17 Am. Dec. 111; sec. 350, ante.

### § 352. Survivorship.

From the intimate union of interest and possession which exists between joint tenants, there arises the most important incident of an estate in joint tenancy, namely, the *jus accrescendi*, or right of survivorship;<sup>1</sup> by which it is meant that, upon the death of one joint tenant, the entire estate remains to the survivors, and at length to the last survivor, and does not pass to the heirs or other representatives of the deceased cotenant.<sup>2</sup> The survivor shall alone be entitled to the whole estate, whatever it be, which was created by the original grant.<sup>3</sup> Two corporations cannot be joint tenants together, because, each being perpetual, there can be no survivorship between them.<sup>4</sup> And a corporation cannot be a joint tenant with a natural person, for the alleged reason that there is no mutuality of survivorship between them.<sup>5</sup> The incident of survivorship was not favored in

equity;<sup>6</sup> and in this country the rule of survivorship has been abolished by statute in many of the states, specially excepting, as already noticed, the case of joint trustees.<sup>7</sup> In other states, devises or grants to several are taken to be tenancies in common, unless the instrument creating the estate expressly declares otherwise, excepting, however, estates to joint trustees.<sup>8</sup>

1 See Coke on Littleton, 181b; 1 Greenleaf's Cruise on Real Property, 836; Case v. Owen, 139 Ind. 22, 47 Am. St. Rep. 253.

2 2 Blackstone's Commentaries, 183; Cray v. Willis, 2 P. Wms. 530; Brompton v. Alkis, 2 Vern. 556; De Witt v. San Francisco, 2 Cal. 289.

3 2 Blackstone's Commentaries, 184; Overton v. Lacy, 6 T. B. Mon. 13, 17 Am. Dec. 111.

4 De Witt v. San Francisco, 2 Cal. 289; Lyster v. Kirkpatrick, 26 U. C. Q. B. 217.

5 2 Blackstone's Commentaries, 184; and see 1 Greenleaf's Cruise on Real Property, 839; Telfair v. Howe, 3 Rich. Eq. 235, 55 Am. Dec. 637.

6 Rigden v. Vallier, 3 Atk. 731; Gould v. Kemp, 2 Mylne & K. 309; Randall v. Phillips, 3 Mason, 386. Compare Barclay v. Hendrick, 3 Dana, 380.

7 See sec. 343, ante. Estates of joint trustees are not excepted in New Jersey: Boston Franklinite Co. v. Condit, 19 N. J. Eq. 394; nor in Kentucky: Sanders v. Morrison, 17 T. B. Mon. 54, 18 Am. Dec. 161.

8 See 1 N. Y. Rev. Stats., sec. 44, p. 727; 4 Kent's Commentaries, 361; Shaw v. Hearsey, 5 Mass. 522; Sergeant v. Steinberger, 2 Ohio, 305; Webster v. Vandeventer, 6 Gray, 428; Purdy v. Purdy, 3 Md. Ch. 547.

### § 353. Other Incidents of Joint Tenancy.

Among other incidents of an estate in joint tenancy are the following: Livery of seisin made to



one joint tenant will inure to all;<sup>1</sup> so an entry or re-entry made by one is as effectual as if it were the act of all;<sup>2</sup> and the occupation by one is *prima facie* an occupation by all.<sup>3</sup> If joint tenants make a lease, and the lessee surrenders to one of them, this will inure to all.<sup>4</sup> If waste of the joint estate be committed by one joint tenant, the other is entitled to an action of waste against him by construction of the statute Westminster II, chapter 22.<sup>5</sup> And by statute 4 & 5 Anne, chapter 16, one joint tenant may maintain an action of account against the other, who alone had received the whole profits of the joint estate.<sup>6</sup> Joint tenants must join in an action for the possession of land jointly held;<sup>7</sup> and one can neither sue nor be sued alone, in respect to the joint estate, if advantage be properly taken of the omission to join his cotenants.<sup>8</sup> Either joint tenant may convey his share of the estate to a cotenant or to a stranger;<sup>9</sup> but a devise of his share would be inoperative, since the right of survivorship would take precedence of the devise.<sup>10</sup> Nor can one joint tenant bind his cotenant by a contract for the sale of the joint estate, without prior authority from his cotenant, or by his subsequent ratification of the contract.<sup>11</sup> A joint tenant may mortgage his interest in the property of the cotenancy, and to the extent of the mortgage lien the interest of the survivor will be destroyed or suspended.<sup>12</sup>

1 Coke on Littleton, 49b.

2 2 Blackstone's Commentaries, 182; 1 Greenleaf's Cruise on Real Property, 844.

3 Ford v. Grey, 6 Mod. 44; Small v. Clifford, 38 Me. 213. Compare Drane v. Gregory, 3 B. Mon. 619. There can be neither curtesy nor dower of an estate in joint tenancy: 1 Greenleaf's Cruise on Real Property, 842, 843. Dower is allowed by statute in Mississippi: James v. Rowan, 6 Smedes & M. 393.

4 2 Blackstone's Commentaries, 182; 1 Greenleaf's Cruise on Real Property, 844.

5 2 Blackstone's Commentaries, 183; Shiels v. Stark, 14 Ga. 429.

6 1 Greenleaf's Cruise on Real Property, 845; Fanning v. Chadwick, 3 Pick. 423, 15 Am. Dec. 233. Assumpsit is now the usual remedy: See 4 Kent's Commentaries, 369; Sargent v. Parsons, 12 Mass. 152.

7 Dewey v. Lambier, 7 Cal. 347.

8 2 Blackstone's Commentaries, 182; 1 Wms. Saund. 291f; Webster v. Vandeventer, 6 Gray, 428. Compare Mitchell v. Tarbutt, 5 Term Rep. 651.

9 Rector v. Waugh, 17 Mo. 13; Shaw v. Hearsey, 5 Mass. 522; Denne v. Judge, 11 East, 288; Gates v. Salmon, 35 Cal. 588; Wilkins v. Young, 144 Ind. 1, 55 Am. St. Rep. 162.

10 Coke on Littleton, 185b; 1 Washburn on Real Property, \*412; Duncan v. Forrer, 6 Binn. 193; Wilkins v. Young, 144 Ind. 1, 55 Am. St. Rep. 162

11 Hanks v. Enloe, 33 Tex. 624.

12 Wilkins v. Young, 144 Ind. 1, 55 Am. St. Rep. 162.

## § 354. Trustees as Joint Tenants.

Generally speaking, cotrustees are joint tenants of the estate vested in them, and it will go to the survivor.<sup>1</sup> Even in those states where the rule of survivorship is abolished as to ordinary joint estates, an exception is made in the cases of estates given to two or more trustees.<sup>2</sup>

1 Rabe v. Fyler, 10 Smedes & M. 440, 48 Am. Dec. 733; Shook v. Shook, 19 Barb. 653; Parsons v. Boyd, 20 Ala. 112; Shartz v. Unangst, 3 Watts & S. 45; Gray v. Lynch, 8 Gill, 423; Warden v. Richards, 11 Gray, 278.

2 See secs. 350, 353, ante; Webster v. Vandeventer, 6 Gray, 428. A conveyance to a trustee for the use and benefit of two or more persons vests the equitable estate in the cestuis que trust as joint tenants: Greer v. Blanchar, 40 Cal. 194.

### § 355. Dissolution of Joint Tenancy.

A joint tenancy may be severed and destroyed by the destruction of any of its constituent unities,<sup>1</sup> except that of time, which, as it relates solely to the commencement of the joint estate, cannot be affected by any subsequent transaction.<sup>2</sup>

1 1 Greenleaf's Cruise on Real Property, 847; Denne v. Judge, 11 East, 288; Chester v. Willan, 2 Saund. 96; Brown v. Raindle, 3 Ves. 257; Simpson v. Ammons, 1 Binn. 175, 2 Am. Dec. 425. See sec. 367, post.

2 2 Blackstone's Commentaries, 185; 1 Greenleaf's Cruise on Real Property, 847. A mortgage executed by two out of three joint tenants is a severance of the joint tenancy: Simpson v. Ammons, 1 Binn. 175, 2 Am. Dec. 425.

### § 356. Estates in Coparcenary.

The estate in coparcenary arises, at common law, where a man dies seised of an inheritance, and his next heirs are two or more females or their representatives, in which case the estate descends to all of them jointly, and these coheirs are called coparceners.<sup>1</sup> So in England this estate arises by particular custom, as in gavelkind, by descent of the lands to all the males in equal

degree, as sons, brothers, uncles, etc.<sup>2</sup> In either of these cases all the parceners together make but one heir, and have but one estate among them.<sup>3</sup> Coparceners, like joint tenants, have the same unities of interest, title, and possession.<sup>4</sup> But there is no survivorship incident to this estate,<sup>5</sup> and coparceners always claim by descent, while joint tenants always claim by purchase.<sup>6</sup> Curtesy and dower are, however, incident to estates in coparcenary.<sup>7</sup> The estate may be dissolved by the alienation of one coparcener to a stranger,<sup>8</sup> by partition,<sup>9</sup> or by the whole at last descending to one of the coparceners.<sup>10</sup> In the United States land descends to all the children, whether male or female, equally, and they take as tenants in common, and not as parceners.<sup>11</sup> Hence the English doctrines relating to estates in coparcenary are deemed of little importance in this country.<sup>12</sup>

1 2 Blackstone's Commentaries, 188; 1 Greenleaf's Cruise on Real Property, 859.

2 2 Blackstone's Commentaries, 188.

3 2 Blackstone's Commentaries, 188; Burton on Real Property, sec. 316; Hoffer v. Dement, 5 Gill, 137, 46 Am. Dec. 628; and see Leigh v. Shepherd, 2 Brod. & B. 465.

4 1 Greenleaf's Cruise on Real Property, 859, 860. See Gill v. Fauntleroy, 8 B. Mon. 177; Manchester v. Doddridge, 3 Ind. 360.

5 Coke on Littleton, 164; 4 Kent's Commentaries, 364.

6 2 Blackstone's Commentaries, 188.

7 1 Greenleaf's Cruise on Real Property, 862.

8 1 Greenleaf's Cruise on Real Property, 862; Coke on Littleton, 175a.

9 1 Greenleaf's Cruise on Real Property, 863; Burton

on Real Property, sec. 318; and see *Wildy v. Barney*, 31 Miss. 652.

10 2 Blackstone's Commentaries, 191.

11 See 4 Kent's Commentaries, 367; 1 Washburn on Real Property, 415; *Malcolm v. Rogers*, 5 Cow. 188, 15 Am. Dec. 464. In Maryland they take as coparceners: *Hoffar v. Dement*, 5 Gill, 132, 46 Am. Dec. 628.

12 See 4 Kent's Commentaries, 367; *Coles v. Wooding*, 2 Pat. & H. 197; *Campbell v. Wallace*, 12 N. H. 362, 37 Am. Dec. 219; *Stevenson v. Cofferin*, 20 N. H. 150.

### § 357. Nature of Tenancy in Common.

A tenancy in common arises where two or more persons hold lands or tenements in fee simple, or for term of life or years, by several and distinct titles, and occupy the same lands and tenements in common.<sup>1</sup> Unity of right of possession merely is all that is required between tenants in common.<sup>2</sup> One may hold his part in fee, and another for life; one may hold by descent, the other by purchase; the one by purchase from A, the other by purchase from B; the estate of one may have been vested fifty years, of the other but yesterday, and the like.<sup>3</sup> In short, they have several and distinct estates in their respective parts, thus differing from joint tenants who have the land by one joint title and in one right.<sup>4</sup> And the estate of a tenant in common is subject to the same dispositions, incidents, and charges as an estate owned in severalty.<sup>5</sup> Curtesy and dower are incident thereto;<sup>6</sup> but there is no survivorship among tenants in common,<sup>7</sup> and on the death of one his interest passes to his heirs.<sup>8</sup> Generally

speaking, each tenant in common may manage his estate in any way he pleases, provided he does not injure his cotenants.<sup>9</sup> Each is bound to preserve the estate in good faith for the equal benefit of all.<sup>10</sup>

1 Coke on Littleton, 189a; 1 Greenleaf's Cruise on Real Property, 868. There is no presumption that the interests of tenants in common are equal: *Campau v. Campau*, 44 Mich. 31. But compare *Burton v. Kennedy*, 63 Vt. 350, 25 Am. St. Rep. 769; *Huffman v. Mulkey*, 78 Tex. 556, 22 Am. St. Rep. 71.

2 *Putnam v. Ritchie*, 6 Paige, 398; *Story v. Saunders*, 8 Humph. 663; *Bernecker v. Miller*, 40 Mo. 473, 93 Am. Dec. 309; *Spencer v. Austin*, 38 Vt. 258; *Metcalf v. Miller*, 96 Mich. 459, 35 Am. St. Rep. 617.

3 Coke on Littleton, 189a; 2 Blackstone's Commentaries, 191; *Putnam v. Ritchie*, 6 Paige, 390; *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422; *Metcalf v. Miller*, 96 Mich. 459, 35 Am. St. Rep. 617.

4 1 *Preston on Estates*, 137; *Madison v. Larmon*, 170 Ill. 65, 62 Am. St. Rep. 356.

5 See *Nichols v. Smith*, 22 Pick. 316; *Whitton v. Whitton*, 38 N. H. 127, 75 Am. Dec. 163; *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139; *Blessing v. House*, 3 Gill & J. 290; *Shepardson v. Rowland*, 28 Wis. 108.

6 1 Greenleaf's Cruise on Real Property, 879, 880; *Brown v. Adams*, 2 Whart. 188; *Sterling v. Penlington*, 14 Vin. Abr. 511; *Sutton v. Rolfe*, 3 Lev. 84; *Blossom v. Blossom*, 9 Allen, 254; *Carr v. Givens*, 9 Bush, 679, 15 Am. Rep. 747; *Ham v. Ham*, 14 U. C. Q. B. 497

7 *Putnam v. Ritchie*, 6 Paige, 390.

8 *Burton on Real Property*, sec. 38; 1 Greenleaf's Cruise on Real Property, 869. An agreement in writing, between tenants in common, that the survivor shall take the other's estate is invalid: *Hershy v. Clark*, 35 Ark. 17, 37 Am. Rep. 1.

9 *Peabody v. Minot*, 24 Pick. 329. One tenant in common may separately insure his interest against fire, and in case of loss, recover and retain the insurance: *Harvey v. Cherry*, 76 N. Y. 436.

10 *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422.

**§ 357a. Who may be Tenants in Common.**

If two or more persons are entitled to land in such manner that they have an undivided possession, but several freeholds, they are tenants in common, and the owners of life estates are held to be holders in cotenancy within this definition.<sup>1</sup> And it is held that one who owns three undivided tenths of a parcel of land in possession, and who is also the owner of a life estate in the remaining seven-tenths, is a tenant in common with the owners of the seven-tenths.<sup>2</sup> In some of the states, in which statutes have been enacted enlarging the rights of married women, the doctrine is maintained that a husband and wife may hold property as tenants in common. If no contrary intent is expressed in the conveyance to them or the instrument under which they hold, they take as tenants in common, and not in entirety.<sup>3</sup> But in other states the opposite of this doctrine is asserted.<sup>4</sup>

1 *Metcalf v. Miller*, 96 Mich. 459, 35 Am. St. Rep. 617.

2 *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891.

3 *Robinson*, Appellant, 88 Me. 17, 51 Am. St. Rep. 367; and see *Hoffman v. Stigers*, 28 Iowa, 302; *Cooper v. Cooper*, 76 Ill. 57; *Clark v. Clark*, 56 N. H. 105; sec. 366, post.

4 See *Hiles v. Fisher*, 144 N. Y. 306, 43 Am. St. Rep. 762; *Harrison v. Ray*, 108 N. C. 215, 23 Am. St. Rep.

57; *Bramberry's Appeal*, 156 Pa. St. 628, 36 Am. St. Rep. 64; *Phelps v. Simons*, 159 Mass. 415, 38 Am. St. Rep. 430; and sec. 366, post.

### § 358. Creation of Tenancy in Common.

A tenancy in common may be created by the destruction of an estate in joint tenancy or coparcenary, or by special limitations in a deed or will.<sup>1</sup> Any words in the latter instrument denoting equality of interest will be construed as conferring a tenancy in common.<sup>2</sup> The early common law favored title by joint tenancy;<sup>3</sup> and in England, if several persons own land together, they are deemed joint tenants in the absence of any special reason for a different ownership.<sup>4</sup> But this doctrine is reversed in the United States, and the general rule here is, that "wherever two or more persons acquire the same estate by the same act, deed, or devise, and no indication is therein made to the contrary, they will hold as tenants in common."<sup>5</sup> The statutes which have effected this change in the law are generally made applicable by their terms, as well to estates already created or vested as to estates thereafter to be granted or devised;<sup>6</sup> and the constitutionality of this provision has been sustained by the courts.<sup>7</sup>

1 2 Blackstone's Commentaries, 192; 1 Greenleaf's Cruise on Real Property, 868, 869. There may be a tenancy in common of an inchoate as well as of a perfect right: *Wilkins v. Burton*, 5 Vt. 76; *Coleman v. Lane*, 26 Ga. 515.

2 *Harrison v. Foreman*, 5 Ves. 206; and see *Ackerman v. Burrows*, 3 Ves. & B. 54.



3 See sec. 350, ante.

4 See secs. 350, 351, ante.

5 1 Washburn on Real Property, 416; and see 4 Kent's Commentaries, 361; Johnson v. Harris, 5 Hayw. (Tenn.) 113; Young v. De Bruhl, 11 Rich. 638; Miller v. Miller, 16 Mass. 59; secs. 350, 351, ante; Bazemore v. Davis, 55 Ga. 504; Harvey v. Harvey, 72 N. C. 570; Madison v. Larmon, 170 Ill. 65, 62 Am. St. Rep. 356.

6 See 1 N. Y. Rev. Stats., sec. 44, p. 727; Miller v. Miller, 16 Mass. 61.

7 Annable v. Patch, 3 Pick. 363; Hills v. Doe, 6 N. H. 328; Bombaugh v. Bombaugh, 11 Serg. & R. 192. If land is demised to be cultivated on shares, the parties are tenants in common of the crops until a division thereof: Gafford v. Stearns, 51 Ala. 434; Carr v. Dodge, 40 N. H. 403; Knox v. Marshall, 19 Cal. 617; Baughman v. Reed, 75 Cal. 321, 7 Am. St. Rep. 172. But compare Tanner v. Hills, 48 N. Y. 662. But a mere privilege reserved to a person in a dwelling-house for a special purpose and for a limited time does not make him a tenant in common of the estate: Abbott v. Wood, 13 Me. 115

### § 359. Possession by One Cotenant.

In general, the possession of one tenant in common is deemed to be the possession of all.<sup>1</sup> But if one ousts the other or denies his tenure, his possession becomes adverse.<sup>2</sup> The question of ouster is one of intention, to be found by the jury from the overt acts proved in the case.<sup>3</sup> But an ouster may in some cases be presumed by the jury, from an open and exclusive occupancy long continued, as, for instance, for a period of about forty years;<sup>4</sup> or, in one case, for thirty-six years;<sup>5</sup> and in others for twenty years and upward.<sup>6</sup> The flowing of the land by one of the tenants in common may amount to an ouster of his cotenants.<sup>7</sup> So where a

tenant in common would not suffer a cotenant or his agent to enter, and denied his title, retaining the exclusive possession himself, it was held an ouster;<sup>8</sup> and so where a tenant in common refused to pay rent when demanded by his cotenant, and claimed the whole land.<sup>9</sup> But a mortgage of the whole estate by one tenant in common is not conclusive evidence of an ouster of the other tenants.<sup>10</sup> Nor will the peaceable possession of one tenant in common, unaccompanied by any act amounting to an ouster, be construed as an adverse possession.<sup>11</sup>

1 *Jackson v. Tibbits*, 9 Cow. 241; *Vaughan v. Bacon*, 15 Me. 455, 33 Am. Dec. 628; *Hudson v. Coe*, 79 Me. 83, 1 Am. St. Rep. 288; *Alexander v. Gibbon*, 118 N. C. 796, 54 Am. St. Rep. 757; *Johnson v. Toulmin*, 18 Ala. 50, 52 Am. Dec. 212; *Catlin v. Kidder*, 7 Vt. 12; *Thomas v. Hatch*, 3 Sum. 170; *Small v. Clifford*, 38 Me. 213; *Thornton v. York Bank*, 45 Me. 158; *Brown v. Wood*, 17 Mass. 68. In England the rule is now otherwise by statute 3 & 4 William, chapter 27, section 12. Where one tenant in common has the charge of the common property for all the others, his knowledge of an easement therein is the knowledge of his cotenants: *Ward v. Warren*, 82 N. Y. 265.

2 *Coleman v. Clements*, 23 Cal. 245; *Cocks v. Simmons*, 55 Ark. 104, 29 Am. St. Rep. 28; *Harpending v. Dutch Church*, 16 Pet. 455; *Willison v. Watkins*, 3 Pet. 51; *Hart v. Gregg*, 10 Watts, 185, 36 Am. Dec. 166; *Baird v. Baird*, 1 Dev. & B. Eq. 524, 31 Am. Dec. 399; *Newell v. Woodruff*, 30 Conn. 498; *Page v. Branch*, 97 N. C. 97, 2 Am. St. Rep. 281.

3 *Cummings v. Wyman*, 10 Mass. 464; *Prescott v. Nevers*, 4 Mason, 330; *Blackmore v. Gregg*, 2 Watts & S. 182; *Keyser v. Evans*, 30 Pa. St. 507; *Oglesby v. Hollister*, 76 Cal. 136, 9 Am. St. Rep. 177. Compare *Newell v. Woodruff*, 30 Conn. 492; *Purcell v. Wilson*, 4 Gratt.

16; *Culver v. Rhodes*, 87 N. Y. 354; *Miller v. Myers*, 46 Cal. 538.

4 *Jackson v. Whitbeck*, 6 Cow. 632, 16 Am. Dec. 454. See *Bryan v. Atwater*, 5 Day, 188, 8 Am. Dec. 175.

5 *Doe v. Prosser*, Cowp. 217.

6 *Lloyd v. Gordon*, 2 Har. & McH. 254; *Frederick v. Gray*, 10 Serg. & R. 182; *Mehaffy v. Dobbs*, 9 Watts, 363. And compare *Cross v. Robinson*, 21 Conn. 379; *Marr v. Gilliam*, 1 Cold. 488; *Peeler v. Guilkey*, 27 Tex. 355; *Linker v. Benson*, 67 N. C. 160; *Van Dyck v. Van Buren*, 1 Caines, 84; *Kinney v. Slattery*, 51 Iowa, 353; *Rutter v. Small*, 68 Md. 133, 6 Am. St. Rep. 434.

7 *Great Falls Co. v. Worster*, 15 N. H. 412; *Jones v. Weathersbee*, 4 Strob. 50, 51 Am. Dec. 653.

8 *Bracket v. Norcross*, 1 Me. 89; and see *Bigelow v. Jones*, 10 Pick. 161; *Thomas v. Pickering*, 13 Me. 337; *Norris v. Sullivan*, 47 Conn. 474.

9 *Phillips v. Gregg*, 10 Watts, 158, 192, 36 Am. Dec. 158.

10 *Hodgdon v. Shannon*, 44 N. H. 572; *Wilson v. Collishaw*, 13 Pa. St. 276. Compare *Leach v. Beattie*, 33 Vt. 195.

11 *Chandler v. Ricker*, 49 Vt. 128; *Squires v. Clark*, 17 Kan. 84; *Hawk v. Senseman*, 6 Serg. & R. 21; *Challefoux v. Ducharme*, 4 Wis. 554; 8 Wis. 287. And see *Small v. Clifford*, 38 Me. 213; *Peck v. Ward*, 18 Pa. St. 506; *Tulloch v. Worrall*, 49 Pa. St. 140; *Culver v. Rhodes*, 87 N. Y. 354; *Trustees etc. v. Kirk*, 84 N. Y. 220, 38 Am. Rep. 505. As to what acts do or do not amount to an ouster or disseisin, see the following cases: *Hudson v. Coe*, 79 Me. 83, 1 Am. St. Rep. 288; *Oglesby v. Hollister*, 76 Cal. 136, 9 Am. St. Rep. 177; *Page v. Branch*, 97 N. C. 97, 2 Am. St. Rep. 281; *Greenhill v. Biggs*, 85 Ky. 155, 7 Am. St. Rep. 579.

### § 359a. Same—Continued.

The possession of one tenant in common being the possession of all, each has the present right to enter upon the whole land, and upon every part of it, and to occupy and enjoy the whole. An

ouster or disseisin is not, therefore, to be presumed from the mere fact of sole possession, but it may be proved by sole possession accompanied by a notorious claim of exclusive right.<sup>1</sup> It is, however, held that the amount of evidence necessary to prove an ouster of one tenant in common by his cotenant is much greater than in cases in which such relation does not exist between the owner of the legal title and the person holding the actual possession.<sup>2</sup> And an entry by one claiming to be a tenant in common can never become the foundation of an adverse possession as against his cotenants until they have notice, either direct or inferable from notorious acts, of his repudiation of their rights.<sup>3</sup> The burden is upon the one claiming to hold adversely to establish such a state of facts, known to his cotenant, as will amount to an adverse claim of title, and notorious possession alone is held to be insufficient.<sup>4</sup> There must be evidence from which an ouster, a putting out and a keeping out, of the other cotenants, can be inferred.<sup>5</sup> Tenants in common of a natural oyster bed have an equal right to enter thereon, and to remove natural oysters, and one cannot, by draining the bed, and scattering a few seed oysters over it, deprive any of his cotenants of the right to take natural oysters therefrom, though in so doing the latter must, to some extent, disturb the planted oysters.<sup>6</sup>

1 See *Oglesby v. Hollister*, 76 Cal. 136, 9 Am. St. Rep. 177, and note; *Metcalf v. Miller*, 96 Mich. 459, 35 Am. St. Rep. 617; *Morrill v. Morrill*, 20 Or. 96, 23 Am. St. Rep. 95, and note.

2 *Northrop v. Marquam*, 16 Or. 173; *Wheeler v. Taylor*, 32 Or. 421, 67 Am. St. Rep. 540; *Newell v. Woodruff*, 30 Conn. 492.

3 *Oglesby v. Hollister*, 76 Cal. 136, 9 Am. St. Rep. 177; *Weshgyl v. Schick*, 113 Mich. 22; *Wheeler v. Taylor*, 32 Or. 421, 67 Am. St. Rep. 540; *Hignite v. Hignite*, 65 Miss. 447, 7 Am. St. Rep. 673; *Fuller v. Swensberg*, 106 Mich. 305, 58 Am. St. Rep. 481, and note; *Elder v. McClaskey*, 70 Fed. Rep. 529; 17 C. C. A. 251.

4 *Stewart v. Stewart*, 83 Wis. 364, 35 Am. St. Rep. 67. Compare *King v. Carmichael*, 136 Ind. 20, 43 Am. St. Rep. 303; *Pillow v. Improvement Co.*, 92 Va. 144, 53 Am. St. Rep. 804.

5 *Mansfield v. McGinness*, 86 Me. 118, 41 Am. St. Rep. 532.

6 *Mott v. Underwood*, 148 N. Y. 463, 51 Am. St. Rep. 711.

### § 359b. Same—Purchase of Outstanding Title.

It is a well-established general rule that a tenant in common cannot purchase to his exclusive benefit an outstanding adverse encumbrance or title to the common property.<sup>1</sup> The rule is based on the community of interest in a common title, creating such a relation of trust and confidence between the parties, that it would be inequitable to permit one of them to do anything to the prejudice of the others in reference to the common property.<sup>2</sup> But his cotenants, in order to participate in the benefit of the purchase, must, within a reasonable time, make an election to claim its benefit and contribute their respective ratios to the consideration paid.<sup>3</sup> Their refusal to so con-

tribute may be either express or necessarily implied from their conduct.<sup>4</sup> The general rule stated above applies to the purchase by a cotenant in a mining claim of an interest in a senior conflicting claim.<sup>5</sup> And is also applied to the purchase by a cotenant of a tax title to the common property.<sup>6</sup> But when the interests of several cotenants are separately assessed, neither is under obligation to pay the taxes due from the other, and either may, therefore, purchase the interest of the other at a tax sale thereof and assert any title acquired from such sale.<sup>7</sup> And a purchase by a cotenant of the lands of a cotenancy at a tax sale may vest title as against strangers. If the other cotenants do not complain, a stranger cannot.<sup>8</sup>

1 *Gilchrist v. Beswick*, 33 W. Va. 168; *Carpenter v. Carpenter*, 131 N. Y. 101, 27 Am. St. Rep. 569; *Tanney v. Tanney*, 159 Pa. St. 277, 39 Am. St. Rep. 679; *Ramberg v. Wahlstrom*, 140 Ill. 182, 33 Am. St. Rep. 227.

2 *Forrer v. Forrer*, 29 Gratt. 144.

3 *Cecil v. Clark*, 44 W. Va. 659; *Stewart v. Stewart*, 90 Wis. 516, 48 Am. St. Rep. 949; *Ramberg v. Wahlstrom*, 140 Ill. 182, 33 Am. St. Rep. 227.

4 *Stevens v. Reynolds*, 143 Ind. 467, 52 Am. St. Rep. 422.

5 *Franklin Min. Co. v. O'Brien*, 22 Colo. 129, 55 Am. St. Rep. 118.

6 *Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334; *Cohea v. Hemingway*, 71 Miss. 22, 42 Am. St. Rep. 449; *Tanney v. Tanney*, 159 Pa. St. 277, 39 Am. St. Rep. 678.

7 *Brittin v. Handy*, 20 Ark. 381, 73 Am. Dec. 497; *Bennett v. Improvement Co.*, 23 Colo. 470, 58 Am. St. Rep. 281.

<sup>8</sup> *Burgett v. Williford*, 56 Ark. 187, 35 Am. St. Rep 96.

**§ 360. One Cotenant may Sue Another.**

In the case of an actual ouster of one tenant in common by his cotenant, the former may sue the latter in ejectment to recover his share of the common estate;<sup>1</sup> and in case of a recovery in such action, trespass for mesne profits may be brought.<sup>2</sup> And it has been held that one tenant in common may have trespass quare clausum fregit against his cotenant, where an actual ouster is proved.<sup>3</sup> But, as a general rule, trespass quare clausum cannot be maintained by one tenant in common against another, unless there has been a total destruction of the subject matter of the tenancy, or some part of it.<sup>4</sup> It seems, however, that an action on the case will lie for a misuse of the common property, though not amounting to a total destruction of it.<sup>5</sup> Thus if one tenant in common of a mill erects a dam below on the same stream upon his several estate, and thereby flows the common property, to the injury of his cotenant, the latter may maintain an action on the case therefor against him for damages;<sup>6</sup> and so if he diverts the water from their common mill for separate purposes of his own.<sup>7</sup> One tenant in common may have an action of waste against his cotenant for waste done on the premises;<sup>8</sup> and, in a proper case, an injunction will lie to restrain the commission of waste.<sup>9</sup> If one tenant in common ev-

clusively occupies the whole, or more than his share of the common estate, he is liable to account to his cotenant for rents and profits in an action of account.<sup>10</sup> But if he occupies the same common property, he is not liable to his cotenant for rents and profits of the land received by him, unless he received more than his share;<sup>11</sup> though, if he disseises his cotenant and ousts him of the possession, this rule is held not to apply.<sup>12</sup> Assumpsit will not lie by a tenant in common against his companion, to recover for the use and occupation of the common property, in the absence of an express contract to pay rent.<sup>13</sup> Where a cotenant collects rents arising from the common property, and refuses to pay over any part of them to his cotenants for a long time, he is liable for interest thereon from the time he collected them, although he has made no interest himself.<sup>14</sup> If the interest of one cotenant is sold on execution, a tenant under a lease from all of the cotenants must account to a purchaser at such sale for a moiety of the rents and profits under a statute entitling the purchaser at such a sale to recover the value of the use and occupation of the property from the date of the sale from a tenant in possession thereof.<sup>15</sup>

1 *Peaceable v. Read*, 1 East, 568; *Halford v. Tetherow*. 2 *Jones*, 393; *Noble v. McFarland*, 51 Ill. 226; *Bethell v. McCool*, 46 Ind. 303; *Norris v. Sullivan*, 47 Conn. 474; *Gale v. Hines*, 17 Fla. 778.

2 *Goodtitle v. Tombs*, 3 Wils. 118; *Bennett v. Bullock*,



35 Pa. St. 367; *Cook v. Webb*, 21 Minn. 428; *Camp v. Homesley*, 11 Ired. 211.

3 *Booth v. Adams*, 11 Vt. 156, 34 Am. Dec. 680; *McGill v. Ash*, 7 Pa. St. 397; *Erwin v. Olmsted*, 7 Cow. 229; *Thompson v. Gerrish*, 57 N. H. 85; *Murray v. Hall*, 7 Com. B. 441; *Silloway v. Brown*, 12 Allen, 37.

4 *Cubitt v. Porter*, 8 Barn. & C. 268; 2 *Ryan & M.* 272; *Maddox v. Goddard*, 15 Me. 218, 33 Am. Dec. 604; *Filbert v. Hoff*, 42 Pa. St. 97, 82 Am. Dec. 493; *Bennett v. Bullock*, 35 Pa. St. 364. And compare *Roberts v. McGraw*, 11 Bush, 26; *Hastings v. Hastings*, 110 Mass. 285; *Lawton v. Adams*, 29 Ga. 273, 74 Am. Dec. 59.

5 *McLellan v. Jenness*, 43 Vt. 183, 5 Am. Rep. 270; and see *Hyde v. Stone*, 9 Cow. 230, 18 Am. Dec. 501; *Lowe v. Miller*, 3 Gratt. 205, 46 Am. Dec. 188; *Farr v. Smith*, 9 Wend. 338, 24 Am. Dec. 162; *Agnew v. Johnson*, 17 Pa. St. 373, 55 Am. Dec. 565; *Benedict v. Torrent*, 83 Mich. 181, 21 Am. St. Rep. 589.

6 *Odiorne v. Lyford*, 9 N. H. 502, 32 Am. Dec. 387; *Pillsbury v. Moore*, 44 Me. 154, 69 Am. Dec. 91.

7 *Blanchard v. Baker*, 8 Me. 253, 23 Am. Dec. 504.

8 *Matts v. Hawkins*, 5 Taunt. 20. On this subject, the statute of the particular state should be consulted: See 4 Kent's Commentaries, 369, note; *Williamson v. Jones*, 43 W. Va. 562, 64 Am. St. Rep. 891.

9 *Twort v. Twort*, 16 Ves. 132; *Bailey v. Hobson*, L. R. 5 Ch. 180; *Burton on Real Property*, sec. 1581; *Mott v. Underwood*, 148 N. Y. 463, 51 Am. St. Rep. 711; *Hawley v. Clowes*, 2 Johns. Ch. 122.

10 *Buckelew v. Snedeker*, 27 N. J. Eq. 82; *Field v. Craig*, 8 Allen, 357; *Gowen v. Shaw*, 40 Me. 56; *Wright v. Wright*, 59 How. Pr. 176; *Pico v. Columbe*, 12 Cal. 414, 73 Am. Dec. 550; *Roseboom v. Roseboom*, 15 Hun, 309; *Graham v. Pierce*, 19 Gratt. 28, 100 Am. Dec. 658; *Swallow v. Swallow*, 31 N. J. Eq. 390. See *Joslyn v. Joslyn*, 9 Hun, 388.

11 *Keisel v. Earnest*, 21 Pa. St. 90; *Calhoun v. Curtis*, 4 Met. 413, 38 Am. Dec. 380; and see *Scott v. Guernsey*, 60 Barb. 163; 48 N. Y. 106; *Jones v. Cohen*, 82 N. C. 75. If tenants in common sell and convey property, and one receives the entire purchase money, the other can maintain an action for money had and received to re-

cover his proportion of the price: *Wright v. Searles*, 59 How. Pr. 176.

12 *Sears v. Sellen*, 28 Iowa, 501. Compare *Bazemore v. Davis*, 55 Ga. 504; *Bird v. Bird*, 15 Fla. 424; *Bates v. Hamilton*, 144 Mo. 1, 66 Am. St. Rep. 407.

13 *Crow v. Mark*, 52 Ill. 332; *Kline v. Jacobs*, 68 Pa. St. 57. A tenant in common cannot sue his fellow to recover documents relating to their joint estate: *Cowes v. Hawley*, 12 Johns. 484.

14 *Bates v. Hamilton*, 144 Mo. 1, 66 Am. St. Rep. 407.

15 *Harris v. Foster*, 97 Cal. 292, 33 Am. St. Rep. 187. See further, as to liability between cotenants for use and occupation, *McCord v. Oakland etc. Co.*, 64 Cal. 139, 49 Am. Rep. 696; *Hamby v. Wall*, 48 Ark. 137, 3 Am. St. Rep. 219; *Humphries v. Davis*, 100 Ind. 371; *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911.

### § 361. Actions Against Strangers.

By the rule of the common law tenants in common must sever in real actions, and may not join because their estates are several.<sup>1</sup> But they must join in actions for injuries to their real estate, as trespass quare clausum, nuisance, and the like, for the reason that the damages belong to them jointly.<sup>2</sup> And if they demise the common estate they must join in the action to recover the rent reserved.<sup>3</sup> But one tenant in common may let his share of the common property, and his cotenant need not be joined as a plaintiff in an action to recover the rent.<sup>4</sup>

1 *Coke on Littleton*, 200a; *Malcolm v. Rogers*, 5 Cow. 188, 15 Am. Dec. 464; *May v. Parker*, 12 Pick. 34. 22 Am. Dec. 393; *Hines v. Frantham*, 27 Ala. 359; *Doe v. Errington*, 1 Ad. & E. 755; *Dawson v. Mills*, 32 Pa. St. 302; *Covillaud v. Tanner*, 7 Cal. 38; *Stevenson v. Cofferin*, 20 N. H. 150. One tenant in common may recover the

entire common estate in ejectment as against a stranger: *Sharon v. Davidson*, 4 Nev. 416; *Hart v. Robertson*, 21 Cal. 346; *Wiese v. Barker*, 7 Colo. 180; *Hannegan v. Roth*, 12 Wash. 698; *Brown v. Warren*, 16 Nev. 241; *Sherin v. Larson*, 28 Minn. 525; *Coulson v. Wing*, 42 Kan. 511, 16 Am. St. Rep. 506; *Brady v. Kreuger*, 8 S. Dak. 464, 59 Am. St. Rep. 771.

2 *Parke v. Kilham*, 8 Cal. 77, 68 Am. Dec. 310; *Campbell v. Wallace*, 12 N. H. 362, 37 Am. Dec. 219; *Bullock v. Hayward*, 10 Allen, 460; *Low v. Mumford*, 14 Johns. 426, 7 Am. Dec. 469; *Decker v. Livingston*, 15 Johns. 479; and see *De Puy v. Strong*, 37 N. Y. 372. But where the tenants in common are not jointly interested in the damages, the remedy may be by a several action: *Lothrop v. Arnold*, 25 Me. 136, 43 Am. Dec. 256; *Longfellow v. Quimby*, 29 Me. 196, 48 Am. Dec. 525.

3 *Wall v. Hinds*, 4 Gray, 256, 64 Am. Dec. 64; *Wilkinson v. Hall*, 1 Bing. N. C. 713; *Sherman v. Ballou*, 9 Cow. 308.

4 *Hayden v. Patterson*, 51 Pa. St. 261; *Powis v. Smith*, 5 Barn. & Ald. 851; and see *Cook v. Brightly*, 46 Pa. St. 439; *Muller v. Boggs*, 25 Cal. 175. Tenants in common should distrain severally, but their joinder is a mere irregularity: *Dutcher v. Culver*, 24 Minn. 584.

### § 362. Improvements, Repairs, Taxes, etc.

At common law, if two persons owned as tenants in common a house or mill which had fallen to decay, and which needed repairs in order to its preservation, either tenant was entitled to his writ, *de reparatione facienda*, to compel his companion to join in making such repairs.<sup>1</sup> But this writ did not extend to other improvements, and, in the absence of any statute upon the subject, one tenant in common cannot go on and make expensive and valuable improvements, which are not repairs in the strict sense of that term, and make

his cotenant liable for any part of the same, in the absence of an express or implied contract to pay therefor.<sup>2</sup> And even in the case of necessary repairs, there must be a previous request to join in making them and a refusal so to do, or no action can be sustained.<sup>3</sup> If one tenant in common, with authority to improve the property, does so in good faith, he cannot be held responsible to the other for errors of judgment in making the improvements, but will be entitled to contribution.<sup>4</sup> It is equally obligatory upon each cotenant to keep the taxes paid,<sup>5</sup> and if one pays them all he is entitled to be reimbursed, with interest.<sup>6</sup> A tenant in common who makes improvements in the belief that he is sole owner may not be charged with the rent of them and may be reimbursed for them in partition.<sup>7</sup> If one tenant in common removes a mortgage or other encumbrance from the common property, he is entitled to subrogation to such lien to secure contribution from his cotenants.<sup>8</sup>

1 Coke on Littleton, 200b; and see *Carver v. Miller*, 4 Mass. 559; *Doane v. Badger*, 12 Mass. 65; *Beaty v. Bordwell*, 91 Pa. St. 438; *Ford v. Knapp*, 102 N. Y. 135, 55 Am. Rep. 782; *Ward v. Ward*, 40 W. Va. 611, 52 Am. St. Rep. 911, and note.

2 *Taylor v. Baldwin*, 10 Barb. 582; *Brown v. Cooper*, 98 Iowa, 444, 60 Am. St. Rep. 190; *Cosgriff v. Foss*, 152 N. Y. 104, 57 Am. St. Rep. 500, and note.

3 *Mumford v. Brown*, 6 Cow. 475, 16 Am. Dec. 440; *Crest v. Jack*, 3 Watts, 238, 27 Am. Dec. 353; *Doane v. Badger*, 12 Mass. 65; *Calvert v. Aldrich*, 99 Mass. 74; 96 Am. Dec. 693; *Thurston v. Dickinson*, 2 Rich. Eq. 317, 46 Am. Dec. 56.

4 Reed v. Jones, 8 Wis. 421; and compare Hall v. Piddock, 21 N. J. Eq. 311.

5 Morgan v. Herrick, 21 Ill. 481.

6 Morgan v. Herrick, 21 Ill. 481; Oliver v. Montgomery, 39 Iowa, 601; and see Anderson v. Greble, 1 Ashm. 136; Stover v. Cory, 53 Iowa, 78; Harrison v. Harrison, 56 Miss. 174; and see Stewart v. Stewart, 90 Wis. 516, 48 Am. St. Rep. 949; Cocks v. Simmons, 55 Ark. 104, 29 Am. St. Rep. 28; Bates v. Hamilton, 144 Mo. 1, 66 Am. St. Rep. 407.

7 Johnson v. Pelot, 24 S. C. 254, 58 Am. Rep. 253; and so, to same effect, Leake v. Hayes, 13 Wash. 213, 52 Am. St. Rep. 34; Ward v. Ward, 40 W. Va. 611, 52 Am. St. Rep. 911.

8 Haverford Loan etc. Assn. v. Fire Assn., 180 Pa. St. 522, 57 Am. St. Rep. 657; Ramberg v. Wahlstrom, 140 Ill. 182, 33 Am. St. Rep. 227.

### § 363. Conveyances by Tenants in Common.

One tenant in common may demise or convey his undivided share;<sup>1</sup> but he cannot, as against the rights of his associates, convey his share in any particular part of the estate held in common by metes and bounds.<sup>2</sup> Nor can a judgment creditor of one tenant in common sell by execution a distinct portion of the estate discharged of the rights of the other tenants in common.<sup>3</sup> Nor can one of several joint owners of land dedicate a part of the common property to the public, against his associates.<sup>4</sup> And a mortgage executed by a tenant in common, of an undivided interest in a specified parcel of land, has no validity as against his cotenants.<sup>5</sup> But it has been held that one tenant in common of separate and distinct parcels of land may convey all his undivided interest in

the whole of any one of the distinct parcels, and his deed will be valid and effectual against his cotenants;<sup>6</sup> and that if an inheritance consists of several distinct freeholds, a tenant in common may convey his undivided interest in any one or more of them, and it may be sold on execution, without reference to any of the other parcels.<sup>7</sup> Upon a conveyance by one tenant in common of his estate to a stranger, the latter will hold in connection with the remaining tenants, merely taking the place in all respects of the grantor.<sup>8</sup> Under the laws of Michigan, one tenant in common of lands cannot convey his interest in the timber growing thereon, and thereby make the other tenants in common cotenants with his grantee in said timber.<sup>9</sup> A tenant in common cannot grant an easement so as to confer a right which can be enforced against the other tenants.<sup>10</sup> Thus he cannot, as against his cotenants, convey to a stranger the right to divert water from the land, nor can he, in a conveyance of his own interest in the common property, create such an easement by a reservation to himself for the benefit of adjoining land which he owns in severalty.<sup>11</sup> A conveyance of a specific part of the common property by one of several cotenants may be ratified by the others, and thus made to operate as a partition or conveyance in severalty, but such ratification must be proved, and will not be presumed.<sup>12</sup> An agreement by one tenant in com-

mon to pay his cotenant for the use of the common property for his own benefit is valid, and may be enforced at law.<sup>13</sup>

1 *Luther v. Arnold*, 8 Rich. 24, 62 Am. Dec. 422; *Shepardson v. Rowland*, 28 Wis. 108; *Butler v. Roys*, 25 Mich. 53, 12 Am. Rep. 218; *Shepherd v. Jernigan*, 51 Ark. 275, 14 Am. St. Rep. 50; *Mee v. Benedict*, 98 Mich. 272, 39 Am. St. Rep. 552.

2 *Bartlet v. Harlow*, 12 Mass. 348, 7 Am. Dec. 76; *Smith v. Knight*, 20 N. H. 9; *Good v. Coombs*, 28 Tex. 34; *Duncan v. Sylvester*, 24 Me. 482, 41 Am. Dec. 400; *Bogges v. Meredith*, 16 W. Va. 1; *Mattox v. Hightshue*, 39 Ind. 95; *Boston etc. Co. v. Condit*, 19 N. J. Eq. 394; *Griswold v. Johnson*, 5 Conn. 363; *Crocker v. Tiffany*, 9 R. I. 505; *Tainter v. Cole*, 120 Mass. 162; *Barnes v. Lynch*, 151 Mass. 510, 21 Am. St. Rep. 470; *Ballou v. Hale*, 47 N. H. 347, 93 Am. Dec. 438. He may convey his share in a particular part of the estate, in Maryland: *Reinicker v. Smith*, 2 Har. & J. 421. In Ohio: *Treon v. Emerick*, 6 Ohio, 391. Or in Missouri: *Barnhart v. Campbell*, 50 Mo. 597. And generally the deed of a part of the common property by metes and bounds, by one of several tenants, is voidable only by the cotenants or some one of them, and is valid against all other persons: *Nichols v. Smith*, 22 Pick. 319. Compare *Sutter v. San Francisco*, 36 Cal. 115; *Young v. Edwards*, 33 S. C. 404, 26 Am. St. Rep. 689, and note.

3 *Porter v. Hill*, 9 Mass. 34, 6 Am. Dec. 22; *Bartlet v. Harlow*, 12 Mass. 348, 7 Am. Dec. 76; *Whilton v. Whilton*, 38 N. H. 127, 75 Am. Dec. 163.

4 *Scott v. State*, 1 Sneed, 629; *St. Louis v. La Clede etc. Co.*, 96 Mo. 197, 9 Am. St. Rep. 334; and see *Reed v. West*, 16 Gray, 283.

5 *Marks v. Sewall*, 120 Mass. 174.

6 *Primm v. Walker*, 38 Mo. 74; and compare *Butler v. Roys*, 25 Mich. 53, 12 Am. Rep. 218; *Nichols v. Smith*, 22 Pick. 316; *Hartford etc. Ore Co. v. Miller*, 41 Conn. 112; *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139.

7 *Butler v. Roys*, 25 Mich. 53, 12 Am. Rep. 218.

8 *Adams v. Frothingham*, 3 Mass. 352, 3 Am. Dec.

151; *Page v. Branch*, 97 N. C. 97, 2 Am. St. Rep. 281; and see *Barnum v. Landon*, 24 Conn. 137.

9 *Benedict v. Torrent*, 83 Mich. 181, 21 Am. St. Rep. 589; and see *Markoe v. Wakeman*, 107 Ill. 263.

10 *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. St. Rep. 653.

11 *Pfeiffer v. Regents etc.*, 74 Cal. 156.

12 *Gordon v. San Diego*, 101 Cal. 522, 40 Am. St. Rep. 73; and see *Battle v. John*, 49 Tex. 210; *Boggess v. Meredith*, 16 W. Va. 28.

13 *Davies v. Skinner*, 58 Wis. 638, 46 Am. Rep. 665.

### § 364. Estates in Partnership.

An estate in partnership "is where real property is purchased and held by two or more partners, out of partnership funds, for partnership purposes."<sup>1</sup> Regarded independently of the rights of creditors, the legal title is in the several partners as tenants in common, and the estate has all the incidents of an estate in common.<sup>2</sup> But equity will regard such real estate as personal property, held in trust for the partnership, and the trust can be enforced by the interested parties, whether partners or creditors.<sup>3</sup> And the English decisions have even carried this doctrine to the extent that real estate purchased with partnership funds and for partnership purposes has for every purpose the quality of personal estate, and that the surplus, after a settlement of the partnership affairs, goes to the personal representative of a deceased partner, instead of his heirs.<sup>4</sup> The same doctrine prevails in some parts of the United States.<sup>5</sup> But the preponderance of American au-



thority is to the effect that the real estate of a partnership is held as personalty for the purposes of the partnership,<sup>6</sup> but when not needed for such purposes, the legal title is released from all trusts, and the surplus descends as other real estate.<sup>7</sup> That is, if one partner dies, his heirs would receive the surplus that may remain after an adjustment of all the partnership affairs, the same as the deceased partner would have received it had he survived, and a dissolution had occurred.<sup>8</sup> Such surplus, which in fact is personal property, has the qualities and incidents of real estate, and would belong to the heirs, subject to the right of dower.<sup>9</sup> It is likewise subject to curtesy and to partition.<sup>10</sup> One partner cannot convey the whole title to real estate, unless the whole title is vested in him,<sup>11</sup> though he may enter into an executory contract to convey which a court of equity will enforce.<sup>12</sup> And any one partner may sell his undivided share,<sup>13</sup> subject, however, to the equitable rights of the creditors.<sup>14</sup> And although one partner can convey the real estate of the partnership, if the legal title is vested in him, the purchaser takes it subject to the equitable rights of the other partners, provided he had knowledge or reasonable means of knowledge of the trust.<sup>15</sup> A lease of the real estate of the partnership by one partner in his own name inures to the benefit of the firm.<sup>16</sup> Real estate purchased with partnership funds and used by the firm in its business is

partnership property, although the legal title is in the names of individual partners.<sup>17</sup>

1 1 Washburn on Real Property, \*422; and see *Smith v. Smith*, 5 Ves. 189; *Brownlee v. Allen*, 21 Mo. 123; *Coder v. Huling*, 27 Pa. St. 84; *Cox v. McBurney*, 2 Sand. 561; *Owens v. Collins*, 23 Ala. 837.

2 *Dyer v. Clark*, 5 Met. 581; *Howard v. Priest*, 5 Met. 585; *Tillinghast v. Chaplain*, 4 R.I. 173, 67 Am. Dec. 510; *Goodburn v. Stevens*, 5 Gill. 1; *Gray v. Palmer*, 9 Cal. 639; *Collins v. Warren*, 29 Miss. 236; *Ludlow v. Cooper*, 4 Ohio St. 1; *Blake v. Nutter*, 19 Me. 16. Compare *Baird v. Baird*, 1 Dev. & B. Eq. 524, 31 Am. Dec. 399; *Price v. Hunt*, 11 Ired. 42.

3 *Buchan v. Sumner*, 3 Barb. Ch. 165; *Langs v. Waring*, 25 Ala. 625, 60 Am. Dec. 533; *Cilley v. Huse*, 40 N. H. 358; *Davis v. Christian*, 15 Gratt. 11; *Fowler v. Bailey*, 14 Wis. 125; *Broom v. Broom*, 3 Mylne & K. 443; *Houghton v. Houghton*, 11 Sim. 491.

4 *Bell v. Phyn*, 7 Ves. 453; *Essex v. Essex*, 20 Beav. 442; and see *Rice v. Barnard*, 20 Vt. 479, 50 Am. Dec. 54.

5 *Pierce v. Trigg*, 10 Leigh. 406; *Dewey v. Dewey*, 35 Vt. 555; *White v. Fitzgerald*, 19 Wis. 480; *Bank of Louisville v. Hall*, 8 Bush, 678; *Thorn v. Thorn*, 11 Iowa, 146; and see *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *Greenwood v. Marvin*, 111 N. Y. 423; *Solomon v. Fitzgerald*, 7 Heisk. 552; *Shanks v. Klein*, 104 U. S. 18.

6 *Shearer v. Shearer*, 98 Mass. 107; *Meily v. Wood*, 71 Pa. St. 488, 10 Am. Rep. 719.

7 *Rice v. Barnard*, 20 Vt. 479, 50 Am. Dec. 54; *Shearer v. Shearer*, 98 Mass. 107; *Gray v. Palmer*, 9 Cal. 639; *Drewry v. Montgomery*, 28 Ark. 256; *Little v. Snedecor*, 52 Ala. 167; *Fairchild v. Fairchild*, 64 N. Y. 471; *Collins v. Warren*, 29 Mo. 236; *Scruggs v. Blair*, 44 Miss. 406; *Holland v. Fuller*, 13 Ind. 195; *Carter v. Flexner*, 92 Ky. 400. See *Van Aken v. Clark*, 82 Iowa, 256.

8 *Shearer v. Shearer*, 98 Mass. 107; *Yeatman v. Woods*, 6 Yerg. 20, 13 Am. Dec. 452; *Williamson v. Fountain*, 7 Baxt. 212.

9 *Collins v. Warren*, 29 Mo. 236; *Dilworth v. May-*

field, 36 Miss. 40; *Davis v. Christian*, 15 Gratt. 11; *Dyer v. Clark*, 5 Met. 562, 39 Am. Dec. 697; *Murrell v. Mandelbaum*, 85 Tex. 22, 34 Am. St. Rep. 777; *Brady v. Kreuger*, 8 S. Dak. 464, 59 Am. St. Rep. 771. Compare *McCauley v. Fulton*, 44 Cal. 355; *People v. Greening*, 102 Cal. 386; *Brown v. Warren*, 16 Nev. 236; *Murphy v. Abrams*, 50 Ala. 293.

10 *Buckley v. Buckley*, 11 Barb. 43; *Piper v. Smith*, 1 Head, 93; *Burnside v. Merrick*, 4 Met. 537; *Patterson v. Blake*, 12 Ind. 436.

11 *Van Brunt v. Applegate*, 44 N. Y. 544; *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *Davis v. Christian*, 15 Gratt. 11.

12 *Chester v. Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550.

13 *Coles v. Coles*, 15 Johns. 159, 8 Am. Dec. 231; *Baker v. Wheeler*, 8 Wend. 505, 24 Am. Dec. 66; *Baca v. Ramos*, 10 La. 417, 29 Am. Dec. 463; *Ross v. Henderson*, 77 N. C. 170.

14 *Treadwell v. Williams*, 9 Bosw. 649; *Donaldson v. Bank of Cape Fear*, 1 Dev. Eq. 103, 18 Am. Dec. 577.

15 *Ridgway's Appeal*, 15 Pa. St. 177, 53 Am. Dec. 586; *Forde v. Herron*, 4 Munf. 316; *Buchan v. Sumner*, 2 Barb. Ch. 165.

16 *Moderwell v. Mullison*, 21 Pa. St. 257.

17 *Page v. Thomas*, 43 Ohio St. 38, 54 Am. Rep. 788, and note 792, discussing the subject.

### § 365. Joint Mortgages.

A mortgagee's interest in the lands mortgaged is generally regarded as an estate in lands;<sup>1</sup> and where lands are conveyed to two or more in mortgage, as security for a joint debt, it is held by them in joint tenancy.<sup>2</sup> The joint mortgagees are joint tenants, and not tenants in common, of the mortgaged lands.<sup>3</sup> So if the mortgage be assigned to two or more persons as trustees of a third party, the title vests in them as joint tenants.<sup>4</sup> If either of the mortgagees die, the survivors may do what

is necessary to foreclose the mortgage, without making his heir or personal representative a party.<sup>5</sup> But when a mortgage is given to two or more persons to secure debts due to them severally, it creates a tenancy in common, and not a joint tenancy;<sup>6</sup> each mortgagee has a right to enforce his claim under the mortgage, in a form adapted to the case, and of course the doctrine of survivorship does not apply.<sup>7</sup> If a mortgage be foreclosed and the estate becomes absolute in the mortgagees, they become tenants in common, although the debt may have been a joint one.<sup>8</sup>

1 Sec. 233, ante.

2 *Appleton v. Boyd*, 7 Mass. 131. Compare *Randall v. Phillips*, 3 Mason, 378.

3 *Webster v. Vandeventer*, 6 Gray, 428.

4 *Webster v. Vandeventer*, 6 Gray, 428.

5 *Martin v. McReynolds*, 6 Mich. 72; *Appleton v. Boyd*, 7 Mass. 131; 1 Washburn on Real Property, \*424.

6 *Brown v. Bates*, 55 Me. 520.

7 *Bennett v. Pratt*, 22 Pick. 557.

8 *Pearce v. Savage*, 45 Me. 90, 92 Am. Dec. 613; *Goodwin v. Richardson*, 11 Mass. 469.

### § 366. Tenants by Entirety.

At common law, upon a conveyance of lands to husband and wife, though not thus described in the instrument of conveyance, the grantees take, not by moieties, but by entireties, and they are called tenants by entirety.<sup>1</sup> Estates by entireties are sometimes spoken of as joint tenancies, but not with strict accuracy.<sup>2</sup> Like a joint tenancy,

they possess the quality of survivorship, but differ in the essential point that neither can convey his or her interest so as to affect the right of survivorship in the other.<sup>3</sup> The alienation by the husband of a moiety will not defeat the wife's title to that moiety if she survive him;<sup>4</sup> but if he survive, the conveyance becomes as effective to pass the whole estate as it would had he been sole seised at the time of the conveyance.<sup>5</sup> The husband may do what he pleases with the rents and profits during coverture, but he cannot dispose of any part of the inheritance without his wife's concurrence.<sup>6</sup> Estates in entirety had their origin in the common-law doctrine that husband and wife are one person in law, and a conveyance to husband and wife is, in legal contemplation, a conveyance but to one person.<sup>7</sup> And the rule is the same where the conveyance is to husband and wife and a third person;<sup>8</sup> the husband and wife, as one person, take but one moiety, and the third person takes the other.<sup>9</sup> In Ohio the doctrine of survivorship is unknown, and a devise to husband and wife makes them tenants in common, and not tenants by entirety.<sup>10</sup> In Connecticut, if land is given to husband and wife, they take as joint tenants.<sup>11</sup> In some of the states it is held that the effect of the married woman's enabling acts is to convert the tenancy by entirety into a tenancy in common.<sup>12</sup> It is however, held in other states that the rule of the common law that a conveyance to

husband and wife constitutes them tenants by the entirety, the survivor taking the whole estate, is not changed by the abolition of joint tenancies, nor by the acts enabling married women to acquire and hold property separate from their husbands.<sup>13</sup> It is said that such enabling acts were intended merely to preserve the wife's estate from liability for the debts of her husband, and authorize her to devise and bequeath it, without changing the common-law rule as to the tenancy by entirety.<sup>14</sup> Tenancy by entireties can exist only where there is a conveyance of a vested interest in the title of real property.<sup>15</sup> And if husband and wife contribute equally from their separate estates moneys which they invest in a bond and mortgage taken in their joint names, to be held by them, their executors, administrators, or assigns, they become tenants in common thereof, and neither can take anything by right of survivorship on the death of the other.<sup>16</sup> Neither husband nor wife can mortgage or convey an estate vested in them as tenants in the entirety, unless both of them join in the instrument.<sup>17</sup> It is, however, held that the husband may convey his interest in the estate, through a third person, to his wife, and the wife may then mortgage the estate and maintain a suit in relation thereto in her own name.<sup>18</sup> On divorce of husband and wife, the tenancy is destroyed, and the property

which was subject thereto vests in them as tenants in common.<sup>19</sup>

1 *Draper v. Jackson*, 16 Mass. 480; *Bolles v. Trust Co.*, 27 N. J. Eq. 308; *Den v. Hardenbergh*, 10 N. J. L. 42, 18 Am. Dec. 371; *Doe v. Howland*, 8 Cow. 277; *Stuckey v. Keefe*, 26 Pa. St. 397; *Taul v. Campbell*, 7 Yerg. 319; *Wales v. Coffin*, 13 Allen, 213; *Ward v. Krumm*, 54 How. Pr. 95; *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266; *Bramberry's Appeal*, 156 Pa. St. 628, 36 Am. St. Rep. 64; *Stelz v. Shreck*, 128 N. Y. 263, 26 Am. St. Rep. 475. If husband and wife succeed to an estate as heirs of the same person, they are tenants by entireties: *Gillan v. Dixon*, 65 Pa. St. 395. If a man and woman who are tenants in common marry, they will continue to hold as tenants in common: 1 Washburn on Real Property, \*424; *Moody v. Moody*, Amb. 649; *Ames v. Norman*, 4 Sneed, 696; *Den v. Hardenbergh*, 10 N. J. L. 42, 18 Am. Dec. 371.

2 See *Chandler v. Cheney*, 37 Ind. 391; *Taul v. Campbell*, 7 Yerg. 333.

3 *Arnold v. Arnold*, 30 Ind. 305; *Harding v. Springer*, 14 Me. 407; *Den v. Hardenbergh*, 10 N. J. L. 42, 18 Am. Dec. 371; *Hemingway v. Scales*, 42 Miss. 1, 2 Am. Rep. 586; *Fisher v. Provin*, 25 Mich. 347; *Farmers' Bank v. Gregory*, 49 Barb. 155; *Hiles v. Fisher*, 144 N. Y. 306, 43 Am. St. Rep. 762. In California husband and wife hold their homestead by a joint tenancy: Cal. Civ. Code, sec. 1265. See *Barber v. Babel*, 36 Cal. 16; *Chase v. Abbott*, 20 Iowa, 151; *Smith v. Shrieves*, 13 Nev. 314, 321.

4 *Shaw v. Hearsey*, 5 Mass. 521.

5 *Ames v. Norman*, 4 Sneed, 683. See *Chandler v. Cheney*, 37 Ind. 391; *Brownson v. Hull*, 5 Vt. 309; *Bates v. Seely*, 46 Pa. St. 248.

6 *Hemingway v. Scales*, 42 Miss. 1, 2 Am. Rep. 586; *Arnold v. Arnold*, 30 Ind. 305; *Phelps v. Simons*, 159 Mass. 415, 38 Am. St. Rep. 430. A mortgage by the husband of land thus held, the wife not joining therein, is void: *Chandler v. Cheney*, 37 Ind. 391. So it is held that crops raised on land owned by husband and wife together cannot be sold on execution against the hus-

band alone: *Patton v. Rankin*, 68 Ind. 245, 34 Am. Rep. 254; and see *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266; *Montgomery v. Hickman*, 62 Ind. 598.

7 *Shaw v. Hearsey*, 5 Mass. 521; *Dias v. Glover*, 1 Hoff. Ch. 71; *Ross v. Garrison*, 1 Dana, 35; *Gibson v. Zimmerman*, 12 Mo. 385; *Green v. King*, 2 W. Black. 121; *Pollock v. Kelly*, 6 I. R. C. L. 367.

8 *Back v. Andrew*, 2 Vern. 120; *Anderson v. Tannehill*, 42 Ind. 141; *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302.

9 *Back v. Andrew*, 2 Vern. 120; and see *Doe v. Wilson*, 4 Barn. & Ald. 303; *Chandler v. Cheney*, 37 Ind. 401. In case of a devise to husband and wife, or to them with others, the husband's interest may be sold on execution, subject to the contingent survivorship of the wife: *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302. Compare *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64.

10 *Wilson v. Fleming*, 13 Ohio, 68.

11 *Benedict v. Galord*, 11 Conn. 337. In Maryland a husband and wife may be made tenants in common or joint tenants according to the express terms of the grant: *Fladung v. Rose*, 58 Md. 13; 26 Alb. L. J. 478; and see *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 266.

12 See *Cooper v. Cooper*, 76 Ill. 57; *Hoffman v. Stigers*, 28 Iowa, 302; *Clark v. Clark*, 56 N. H. 105; *Meeker v. Wright*, 76 N. Y. 262; reversing 11 Hun, 533. In the last-cited case it is held that where, since the passage of the act concerning the rights and liabilities of husband and wife (Laws 1860, c. 90), lands have been conveyed to a husband and wife jointly, without any statement in the deed as to the manner in which the grantees shall hold, they are tenants in common: See, also, *Arnstett v. Arnstett*, 3 Law Bull. 53. But the contrary is now held in New York: *Bertles v. Nunan*, 92 N. Y. 152, 44 Am. Rep. 361; and see *Joos v. Fey*, 129 N. Y. 17; *Miner v. Brown*, 133 N. Y. 308; sec. 357a ante.

13 *Marburg v. Cole*, 49 Md. 402, 33 Am. Rep. 267; *Diver v. Diver*, 56 Pa. St. 106; *Jones v. Chandler*, 40 Ind. 588; *McDuff v. Beauchamp*, 50 Miss. 531; *Garner v. Jones*, 52 Mo. 68; *McCurdy v. Canning*, 64 Pa. St. 39; *Bennett v. Child*, 19 Wis. 365; *Hulett v. Inlow*, 57 Ind. 412, 26 Am. Rep. 64; *Buttlar v. Rosenblath*, 42 N. J. Eq. 651, 59 Am. Rep. 52; *Carver v. Smith*, 90 Ind. 222, 46



Am. Rep. 210; *Thornburg v. Wiggins*, 135 Ind. 178, 41 Am. St. Rep. 422; *Dowling v. Salliotte*, 83 Mich. 131; and see *In re Shaver*, 31 U. C. Q. B. 605; sec. 357a, ante.

14 *Robinson v. Eagle*, 29 Ark. 202; *Diver v. Diver*, 56 Pa. St. 106. See sec. 357a, ante.

15 *Matter of Albrecht*, 136 N. Y. 91, 32 Am. St. Rep. 700.

16 *Matter of Albrecht*, 136 N. Y. 91, 32 Am. St. Rep. 700; and see *Wait v. Bovee*, 35 Mich. 425; *Rodman v. Harvey*, 102 N. C. 1.

17 *Appeal of Lewis*, 85 Mich. 340, 24 Am. St. Rep. 94; *Vinton v. Beamer*, 55 Mich. 559; *Naylor v. Minock*, 96 Mich. 182, 35 Am. St. Rep. 595, and note. But compare *Lanahan v. Caffrey*, 40 N. Y. App. Div. 124.

18 *Donahue v. Hubbard*, 154 Mass. 537, 26 Am. St. Rep. 271; *Enyeart v. Kepler*, 118 Ind. 34, 10 Am. St. Rep. 94.

19 *Hopson v. Fowlkes*, 92 Tenn. 697, 36 Am. St. Rep. 120; *Russell v. Russell*, 122 Mo. 235, 43 Am. St. Rep. 581; *Stelz v. Shreck*, 128 N. Y. 263, 26 Am. St. Rep. 475. But see contra, *Appeal of Lewis*, 85 Mich. 340, 24 Am. St. Rep. 94.

### § 367. Partition.

The allotment to each of two or more joint owners of real property of his share in severalty is called partition.<sup>1</sup> At common law, no owner of any joint estate, parceners excepted, could compel his companion to make partition.<sup>2</sup> But the writ of partition was given by statutes 31 Henry VIII, chapter 1, and 32 Henry VIII, chapter 32, by means of which joint tenants were enabled to compel a partition of their estates;<sup>3</sup> and such continued to be one of the modes of partition in England until the writ of partition was abolished by statutes 3 & 4 William IV,

chapter 27.<sup>4</sup> By the provisions of the latter statute the process of partition has been greatly simplified.<sup>5</sup> In this country the mode of enforcing partition is made the subject of statutory regulation in the several states, and it will be found to be substantially the same in relation to joint tenants and tenants in common.<sup>6</sup> Courts of equity assumed jurisdiction in cases of partition at a very early period,<sup>7</sup> and the partition of incorporeal hereditaments is especially a subject of equitable jurisdiction.<sup>8</sup> But generally speaking, in order to obtain partition in equity, it is necessary for the legal title to be clear and undisputed.<sup>9</sup> Proceedings in partition are in rem;<sup>10</sup> and, like real actions, are generally local.<sup>11</sup>

1 2 Bouvier's Institutes, 410, 411; 2 Blackstone's Commentaries, 323; 1 Greenleaf's Cruise on Real Property, 863; and see *Weiser v. Weiser*, 5 Watts, 279. See as to voluntary partition, Freeman on Cotenancy and Partition, secs. 393, 394. Also, chapter XXXV, post.

2 See Coke on Littleton, 175a; 1 Washburn on Real Property, \*426. *Coles v. Wooding*, 2 Pat. & H. 197; *Venable v. Beauchamp*, 3 Dana, 321, 28 Am. Dec. 78.

3 See Story's Equity Jurisprudence, sec. 646; 2 Blackstone's Commentaries, 323.

4 4 Kent's Commentaries, 364; *Cook v. Allen*, 2 Mass. 469; *M'Kee v. Straub*, 2 Binn. 1.

5 See *Cook v. Allen*, 2 Mass. 469; *Baxter v. Knowles*, 1 Ves. Sr. 494. Late English partition acts are the statutes 31 & 32 Victoria, chapter 40, and 39 & 40 Victoria, chapter 17; and see *Rawlinson v. Miller*, L. R. 1 Ch. Div. 52; 15 Eng. Rep. 644; *In re Frith and Osborne*, L. R. 3 Ch. Div. 618; 18 Eng. Rep. 724; *Porter v. Lopes*, L. R. 7 Ch. Div. 358; 23 Eng. Rep. 631; *Gilbert v. Smith*, L. R. 8 Ch. Div. 548; 25 Eng. Rep. 465; *Crookes v. Whit-*

worth, L. R. 10 Ch. Div. 289; *Gilbert v. Smith*, L. R. 11 Ch. Div. 78; 27 Eng. Rep. 349.

6 See N. Y. Code Civ. Proc., sec. 1532 et seq.; *Potter v. Wheeler*, 13 Mass. 504; *Adam v. Ames Iron Co.*, 24 Conn. 230; *Brownell v. Brownell*, 19 Wend. 367; *Whitten v. Whitten*, 36 N. H. 326; *Griffin v. Griffin*, 33 Ga. 107; *Bollo v. Navarro*, 33 Cal. 459; *Ledbetter v. Gash*, 8 Ired. 462; *Platt v. Stewart*, 10 Mich. 260. A parol partition carried into effect by possession and occupation, in conformity thereto, will be binding between tenants in common whose titles are distinct, and the only object of the division is to ascertain the separate possessions: *Mount v. Morton*, 20 Barb. 128; *Rider v. Maul*, 46 Pa. St. 376; *Shepard v. Rinks*, 78 Ill. 188; *Buzzell v. Gallagher*, 28 Wis. 678. And this is so, although they are *femes covert*, or minors, if the partition is made with the acquiescence of their husbands or guardians: *McConnell v. Carey*, 48 Pa. St. 345. See *Dement v. Williams*, 44 Tex. 158.

7 See *Story's Equity Jurisprudence*, sec. 646; *Baxter v. Knowles*, 1 Ves. Sr. 494; *Smith v. Smith*, 10 Paige, 470; *Bailey v. Sisson*, 1 R. I. 233; *Greenup v. Sewell*, 18 Ill. 53; *Kennedy v. Kennedy*, 43 Pa. St. 413; *Hartshorne v. Hartshorne*, 2 N. J. Eq. 349; *Whitten v. Whitten*, 36 N. H. 332; *Holley v. Grover*, 36 S. C. 404, 31 Am. St. Rep. 883.

8 *Bailey v. Sisson*, 1 R. I. 233; *Holley v. Grover*, 36 S. C. 404, 31 Am. St. Rep. 883.

9 *Whillock v. Hale*, 10 Humph. 64; *Albergottie v. Chaplin*, 10 Rich. Eq. 428; *Shearer v. Winston*, 33 Miss. 149; *Maxwell v. Maxwell*, 8 Ired. Eq. 25. Compare *Miller v. Chittenden*, 2 Iowa, 315; *Ransom v. High*, 37 W. Va. 838, 38 Am. St. Rep. 67; *Haggin v. Haggin*, 2 B. Mon. 317; *Hosford v. Merwin*, 5 Barb. 51; *Hay v. Estell*, 18 N. J. Eq. 251. See sec. 367a, post.

10 *Corwithe v. Griffing*, 21 Barb. 9.

11 *Brown v. McMullen*, 1 Nott & McC. 252; *Bonner. Petitioner*, 4 Mass. 122. See *Platt v. Stewart*, 10 Mich. 260.

**§ 367a. Same—Continued.**

As a general rule, partition may be demanded as a matter of right.<sup>1</sup> And this is so although it may be inconvenient, injurious, or even ruinous to one or more of the parties in interest.<sup>2</sup> It may be compelled though the land sought to be partitioned is subject to a right of way which cannot be destroyed by the partition.<sup>3</sup> And it is held that partition may be decreed by a court of equity whether the title of the parties be legal or equitable.<sup>4</sup> But a court of equity in one state has no jurisdiction to decree a partition of lands in another state.<sup>5</sup> It is the prevailing doctrine that parol partition, followed by exclusive possession and ownership by cotenants, is binding upon them and their heirs.<sup>6</sup> But the parol agreement alone cannot terminate the unity of possession.<sup>7</sup> And parol partition, followed by possession, passes only the equitable title which by adverse possession may ripen into a legal title.<sup>8</sup> Such partition requires of the parties such acts upon the land as show a part performance of the agreement sufficient to bring it within the equity of enforcement.<sup>9</sup> But the partition is valid and conclusive whether made horizontally or vertically.<sup>10</sup> Where partition is made by consent by means of deeds mutually executed, the deeds do not pass title to any real estate, but simply designate the share of each by metes and bounds, destroying the unity of possession, and allotting

the land to be held in severalty.<sup>11</sup> A parol partition, in which one of the tenants in common did not at the time join, may be afterward ratified by him by taking possession of and conveying the part so assigned.<sup>12</sup>

1 *Martin v. Martin*, 170 Ill. 639, 62 Am. St. Rep. 411, and note; *Ransom v. High*, 38 Am. St. Rep. 67; *Willard v. Willard*, 145 U. S. 116.

2 *Donnor v. Quartermas*, 90 Ala. 164, 24 Am. St. Rep. 778.

3 *Crocker v. Cotting*, 170 Mass. 68, 64 Am. St. Rep. 278.

4 *Berry v. Webb*, 77 Ala. 507; *Donnor v. Quartermas*, 90 Ala. 164, 24 Am. St. Rep. 778; *Gore v. Dickinson*, 98 Ala. 363, 39 Am. St. Rep. 67; *Watson v. Sutro*, 86 Cal. 501. See, as to jurisdiction of courts of equity in suits for partition: *Pillow v. Improvement Co.*, 92 Va. 144, 53 Am. St. Rep. 804; *Mayer v. Hover*, 81 Ga. 308; *Holloway v. Holloway*, 97 Mo. 628, 10 Am. St. Rep. 339.

5 *Pillow v. Improvement Co.*, 92 Va. 144, 53 Am. St. Rep. 804; *Wimer v. Wimer*, 82 Va. 890, 3 Am. St. Rep. 126.

6 See *Aycock v. Kimbrough*, 71 Tex. 330, 10 Am. St. Rep. 745, and note; *Murrell v. Mandelbaum*, 85 Tex. 22, 34 Am. St. Rep. 777; *Bruce v. Osgood*, 113 Ind. 360; *Nave v. Smith*, 95 Mo. 596, 6 Am. St. Rep. 79; *Long's Appeal*, 77 Pa. St. 151; *McKnight v. Bell*, 135 Pa. St. 358; *Sutton v. Porter*, 119 Mo. 100, 41 Am. St. Rep. 645.

7 *Lantermann v. Williams*, 55 Cal. 60; *Taylor v. Millard*, 118 N. Y. 245; *Fort v. Allen*, 110 N. C. 183.

8 *Wave v. Smith*, 95 Mo. 596, 6 Am. St. Rep. 79.

9 *Byers v. Byers*, 183 Pa. St. 509, 63 Am. St. Rep. 765.

10 *Byers v. Byers*, 183 Pa. St. 509, 63 Am. St. Rep. 765; and see *Caldwell v. Copeland*, 37 Pa. St. 427, 78 Am. Dec. 436; *Delaware etc. Canal Co. v. Hughes*, 183 Pa. St. 66, 63 Am. St. Rep. 743.

11 *Harrison v. Ray*, 108 N. C. 215, 23 Am. St. Rep. 57.

12 *Sutton v. Porter*, 119 Mo. 100, 41 Am. St. Rep. 645.

**§ 368. Who may Have Partition.**

Tenants in common are entitled to a partition of the land held in common,<sup>1</sup> however inconvenient or injurious it may be to make it.<sup>2</sup> Or if a partition cannot be made, they are entitled to a sale and division of the proceeds.<sup>3</sup> But proceedings for partition ordinarily lie only in favor of one who has a seisin of the premises;<sup>4</sup> consequently, tenants in common of a reversion or remainder cannot apply for partition without the concurrence of the owners of the present estate.<sup>5</sup> It is, however, held that a constructive seisin is sufficient, unless there is proof of an ouster.<sup>6</sup> If a party be disseised, his mere right of entry is not sufficient to entitle him to partition.<sup>7</sup> The heirs of a deceased person, or their grantees, are the proper parties to proceedings for the partition of the real estate of the deceased.<sup>8</sup> But partition will not lie between living heirs and one *en ventre sa mere*.<sup>9</sup> And heirs are not entitled to partition among themselves while the lien of the administrator, for the payment of the intestate's debts, remains upon the land.<sup>10</sup> The grantee of the widow's right of dower in the land may maintain a suit for partition;<sup>11</sup> and a tenant by the curtesy initiate may have partition.<sup>12</sup> So may the owners of an equity of redemption before entry by the mortgagee and possession taken under his mortgage.<sup>13</sup> And the guardian of a minor who is a tenant in common with adults may

have partition.<sup>14</sup> One who purchases the interest of a devisee of real estate may have partition, the same as his vendor.<sup>15</sup> And a partner may have partition of partnership land.<sup>16</sup> In a suit for partition by the committee of a lunatic or habitual drunkard, the lunatic or drunkard should be joined as plaintiff.<sup>17</sup> One having a mere equitable title may apply to the court for partition.<sup>18</sup>

1 *Smith v. Smith*, 10 Paige, 470; *Scovil v. Kennedy*, 14 Conn. 349; *Campbell v. Lowe*, 9 Md. 500, 66 Am. Dec. 339; *Martin v. Martin*, 170 Ill. 639, 62 Am. St. Rep. 411. But see *Danvers v. Dorrity*, 14 Abb. Pr. 206. The right to partition is likewise incident to an ownership in joint tenancy, as well as to estates in common: *Brown v. Cooper*, 98 Iowa, 444, 60 Am. St. Rep. 190; *Holmes v. Holmes*, 2 Jones Eq. 334; *Higginbottom v. Short*, 25 Miss. 160, 57 Am. Dec. 198; *Hanbury v. Hussey*, 15 Jur. 596; 5 Eng. L. & Eq. 81. To maintain a partition action, the plaintiff must be either joint tenant or tenant in common in possession with the other parties to the suit of all lands intended to be divided: *Manolt v. Brush*, 19 N. Y. Daily Reg. No. 137; 3 Law Bull. 66; *Morse v. Stockman*, 65 Wis. 36; and see *Thomas v. Garvan*, 4 Dev. 223, 25 Am. Dec. 708; *Clapp v. Bramagham*, 9 Cow. 530; *Matter of Prentiss*, 7 Ohio, 129, 30 Am. Dec. 203; *McConnell v. Kibbe*, 43 Ill. 12, 92 Am. Dec. 93.

2 *Hanson v. Willard*, 12 Me. 142, 28 Am. Dec. 162; *Witherspoon v. Dunlap*, Harp. 390; *Ledbetter v. Gash*, 8 Ired. 462; sec. 367a, ante.

3 *Potter v. Wheeler*, 13 Mass. 504; *Lucas v. Peters*, 45 Ind. 313; *Gregory v. Gregory*, 69 N. C. 522; *Bradshaw v. Callaghan*, 8 Johns. 558; *Royston v. Royston*, 13 Ga. 425; *Brown v. Cooper*, 98 Iowa, 444, 60 Am. St. Rep. 190, and note.

4 *Brownell v. Brownell*, 19 Wend. 367; *Burhans v. Burhans*, 2 Barb. Ch. 398; *Adam v. Ames Iron Co.*, 24 Conn. 230; *Stevens v. Enders*, 13 N.J.L. 271; *Whitten v. Whitten*, 36 N. H. 326. Partition can only be maintained

by some one having an estate or interest in the lands, and not by a cestui que trust: *Harris v. Larkins*, 22 Hun, 488; *Stryker v. Lynch*, 11 N. Y. Leg. Obs. 116.

5 *Striker v. Mott*, 2 Paige, 387, 22 Am. Dec. 646; *Brown v. Brown*, 8 N. H. 93; *Tabler v. Wiseman*, 2 Ohio St. 207; *Nichols v. Nichols*, 28 Vt. 228; *Hughes v. Hughes*, 63 How. Pr. 408; 11 Abb. N. C. 37. Compare *Blakely v. Colder*, 15 N. Y. 617; *Morse v. Morse*, 85 N. Y. 57; *Brevoort v. Brevoort*, 70 N. Y. 136; *Savage v. Savage*, 19 Or. 112, 20 Am. St. Rep. 775; *Wilkinson v. Stuart*, 74 Ala. 198.

6 *Barnard v. Pope*, 14 Mass. 434, 7 Am. Dec. 225; *Appeal of Hayes*, 123 Pa. St. 110; *Barker v. Jones*, 62 N. H. 497, 13 Am. St. Rep. 586; *Hignite v. Hignite*, 65 Miss. 447, 7 Am. St. Rep. 673; *Rozier v. Johnson*, 35 Mo. 326. Compare *Wommack v. Whitmore*, 58 Mo. 448; *Van Schuyver v. Mufford*, 50 N. Y. 430.

7 *Brock v. Eastman*, 28 Vt. 658. That partition lies for one having a present right of entry, see *Tabler v. Wiseman*, 2 Ohio St. 207; *Marshall v. Crehore*, 13 Met. 462.

8 *Van Derwerker v. Van Derwerker*, 7 Barb. 221.

9 *Gillespie v. Nabors*, 59 Ala. 441, 31 Am. Rep. 20.

10 *Hubbard v. Ricart*, 3 Vt. 207, 23 Am. Dec. 198.

11 *Morgan v. Staley*, 11 Ohio, 389. A tenant in dower has no right to demand partition: *Coles v. Coles*, 15 Johns. 320.

12 *Otley v. McAlpine*, 2 Gratt. 343; *Riker v. Darke*, 4 Edw. Ch. 668. Tenants for life in possession may have partition as between themselves: *Jenkins v. Fahey*, 73 N. Y. 355.

13 *Upham v. Bradley*, 17 Me. 423; *Call v. Barker*, 12 Me. 320; *Colton v. Smith*, 11 Pick. 311; and see *Bradley v. Fuller*, 23 Pick. 1.

14 *Zirkle v. McCue*, 26 Gratt. 517; and compare *Galileo v. Eagle*, 65 Barb. 583; 1 *Thomp. & C.* 124; *Thornton v. Thornton*, 27 Mo. 302; *Mitchell v. Jones*, 50 Mo. 438; *Shull v. Kennon*, 12 Ind. 35.

15 *De Castro v. Barry*, 18 Cal. 96; *Stewart's Appeal*, 56 Pa. St. 241; and see *Collamer v. Hutchins*, 27 Vt. 734; *King v. Howard*, 27 Mo. 21.



16 *Collins v. Dickinson*, 1 Hayw. 240; *Hughes v. Devlin*, 23 Cal. 501; *Canfield v. Ford*, 28 Barb. 336; *Danvers v. Dorrity*, 14 Abb. Pr. 208; *Jackson v. Deese*, 35 Ga. 88. But see *Darby v. Darby*, 3 Drew. 501; *Wild v. Milne*, 26 Beav. 504.

17 *Gorham v. Gorham*, 3 Barb. Ch. 24; and see *Snowden v. Dunlavey*, 11 Pa. St. 522; *Matter of Latham*, 6 Ired. Eq. 406.

18 *Willing v. Brown*, 7 Serg. & R. 467; *Welch v. Anderson*, 28 Mo. 293. Compare *Coale v. Barney*, 1 Gill & J. 341; *Hopkins v. Toel*, 4 Humph. 46; sec. 367a, ante.

### § 368a. Same—Continued.

Partition cannot be had by one having neither the actual nor constructive possession of the premises, against others holding them in hostility to his title.<sup>1</sup> It cannot be maintained by a remainderman or reversioner against the tenant for life in possession.<sup>2</sup> So, generally, partition cannot be awarded, either at law or in equity, of an estate in reversion or remainder, unless authorized by statute.<sup>3</sup> The owners of life estates are holders in cotenancy, and, as between them, partition may be had, but they are not entitled to partition as against the reversioners.<sup>4</sup> But it is held that the owner of an estate by curtesy, together with an undivided interest in the remainder, is entitled to partition as to the latter, against the remaindermen.<sup>5</sup> It is also held that a life tenant of one moiety of land can have partition against the remaindermen of that moiety, whether in esse or not, and the owners in fee simple of the other moiety.<sup>6</sup> And that a

lessee of lands, the reversion of which is in tenants in common, may, upon purchasing a part of the reversion, demand a partition.<sup>7</sup> Under the Missouri statute, where a widow has dower in real estate, the remainderman may have it partitioned, and sold under the partition decree, subject to her life interest.<sup>8</sup> A cotenant may be compelled to secure a partition, by a grantee to whom he has conveyed an interest in severalty.<sup>9</sup> But one tenant in common cannot, without the consent of his cotenants, have a partition of lands which they have devoted to a particular use, which use enters into the consideration of the contract creating it.<sup>10</sup> And tenants in common are not entitled to partition while holding the common property under an unexpired lease from their ancestor.<sup>11</sup> As a general rule, there can be no partition where there is a dispute as to the title. But where a chancery court has acquired jurisdiction upon other grounds, then the cause may be retained for partition.<sup>12</sup>

1 Haskell v. Queen, 66 Hun. 634; 21 N. Y. Supp. 357; Seymour v. Picketts, 21 Neb. 240; McMurtry v. Keifner, 36 Neb. 522; and see Morse v. Stockman, 65 Wis. 36.

2 Whitten v. Whitten, 36 N. H. 326; Savage v. Savage, 19 Or. 112, 20 Am. St. Rep. 795; Seidero v. Giles, 141 Pa. St. 93; Stansbury v. Inglehart, 9 Mackey, 134.

3 Wilkinson v. Stuart, 74 Ala. 198. See, also, Wood v. Sugg, 91 N. C. 93, 49 Am. Rep. 639; Alexander v. Alexander, 26 Neb. 68; Bierce v. James, 87 Tenn. 583; Aydlett v. Pendleton, 111 N. C. 28, 32 Am. St. Rep. 776, and note; Evans v. Bagshaw, L. R. 5 Ch. 340.

4 *Metcalf v. Miller*, 96 Mich. 459, 35 Am. St. Rep. 617.

5 *Atkinson v. Brady*, 114 Mo. 200, 35 Am. St. Rep. 744.

6 *Carneal v. Lynch*, 91 Va. 114, 50 Am. St. Rep. 819; and see *Jordan v. Neece*, 36 S. C. 295, 31 Am. St. Rep. 869.

7 *Hill v. Reno*, 112 Ill. 154, 54 Am. Rep. 222. But see *Jameson v. Hayward*, 106 Cal. 682, 46 Am. St. Rep. 268.

8 *Hayes v. McReynolds*, 144 Mo. 348.

9 *Charleston etc. R. R. Co. v. Leech*, 33 S. C. 175, 26 Am. St. Rep. 667; and see *Young v. Edwards*, 33 S. C. 404, 26 Am. St. Rep. 689.

10 *Appeal of Latshaw*, 122 Pa. St. 142, 9 Am. St. Rep. 76; *Coleman v. Coleman*, 19 Pa. St. 100, 57 Am. Dec. 641. Validity of agreement waiving right to partition: See *Haeussler v. Missouri Iron Co.*, 110 Mo. 188, 33 Am. St. Rep. 431; *Martin v. Martin*, 170 Ill. 639, 62 Am. St. Rep. 411.

11 *Cannon v. Lomax*, 29 S. C. 369, 13 Am. St. Rep. 739.

12 *Hankins v. Layne*, 48 Ark. 544; and see *Holloway v. Holloway*, 97 Mo. 628, 10 Am. St. Rep. 339; *Bowles v. Bowles*, 80 Ky. 529; *Finley v. Cathcart*, 149 Ind. 470, 63 Am. St. Rep. 292.

### § 368b. Parties Plaintiff in Partition.

Two tenants in common may unite in a bill for partition against a third cotenant.<sup>1</sup> A non-resident alien, whose interest in the property will terminate unless he exercises, within three years, his power to sell it, may maintain a suit in partition to have his interest set aside in severalty.<sup>2</sup> A trustee of an express trust holding the legal title to land may maintain a partition suit in his own name, and the fact that he joins minor cestuis que trust as coplaintiffs does not militate

against his right to maintain the suit.<sup>3</sup> But an administrator has no authority to institute or maintain a suit for the partition of land in which his intestate was interested.<sup>4</sup>

1 *Donnor v. Quartermas*, 90 Ala. 164, 24 Am. St. Rep. 778.

2 *Schultze v. Schultze*, 144 Ill. 290, 36 Am. St. Rep. 432.

3 *Snell v. Harrison*, 131 Mo. 495, 52 Am. St. Rep. 642.

4 *Terrell v. Weymouth*, 32 Fla. 255, 37 Am. St. Rep. 94; *Greeley v. Hendricks*, 23 Fla. 366.

### § 369. Parties Defendant in Partition.

All persons interested in the real property sought to be divided should be made parties to the proceedings for partition, either as plaintiffs or defendants;<sup>1</sup> otherwise, they will not be bound by the judgment or decree.<sup>2</sup> Persons who hold encumbrances upon the separate undivided shares need not be made parties.<sup>3</sup> So, before assignment of dower, the widow need not be made a party to an action for the partition of the estate in which she claims dower.<sup>4</sup> Where a wife seeks the partition of her separate estate, the husband should be made a party defendant.<sup>5</sup> And the wife of a tenant in common may be made defendant in an action by him for partition.<sup>6</sup> If a cotenant defendant dies pending a suit for partition, it is necessary that the heir, devisee, or other person authorized to represent the title of such cotenant be made a party defendant before

proceeding with the partition.<sup>7</sup> If minors are interested, the proceedings in partition are void as to them unless they are made parties and are personally served with process.<sup>8</sup>

1 *Bogardus v. Parker*, 7 How. Pr. 305; *Harlan v. Stout*, 22 Ind. 488; *Candy v. Stradley*, 1 Del. Ch. 113; *Knapp v. Hungerford*, 7 Hun, 588; *Kester v. Stark*, 19 Ill. 328; *Newby v. Perkins*, 1 Dana, 440, 25 Am. Dec. 160; *Harman v. Kelley*, 14 Ohio, 502, 45 Am. Dec. 552; *Braker v. Devereux*, 8 Paige, 513; *Sullivan v. Sullivan*, 60 N. Y. 37; *Barney v. Baltimore*, 6 Wall. 280; *Lancaster v. Seay*, 6 Rich. Eq. 111; *Ferris v. Improvement Co.*, 94 Ala. 557, 33 Am. St. Rep. 146; *Schissel v. Dickson*, 129 Ind. 139; *Boone v. Knox*, 80 Tex. 642, 26 Am. St. Rep. 767; *Morse v. Stockman*, 65 Wis. 36. At common law, the nonjoinder of a defendant in an action for partition is matter of abatement only: *Hoxsie v. Ellis*, 4 R. I. 123.

2 *Cook v. Allen*, 2 Mass. 462; *Harlan v. Stout*, 22 Ind. 488; *Munroe v. Luke*, 19 Pick. 39. Compare *Foxcroft v. Barnes*, 29 Me. 128; *Purvis v. Wilson*, 5 Jones, 22, 69 Am. Dec. 773.

3 *Baring v. Nash*, 1 Ves. & B. 551; *Sebring v. Mese-reau*, 9 Cow. 344; *Long's Appeal*, 77 Pa. St. 151; *Thurst-ton v. Minke*, 32 Md. 574; *Low v. Holmes*, 17 N. J. Eq. 148; *Townshend v. Townshend*, 1 Abb. N. C. 81. But compare *Lewis v. Atkinson*, 15 Iowa, 361, 83 Am. Dec. 417.

4 *Power v. Power*, 7 Watts, 205; *Gordon v. Sterling*, 13 How. Pr. 405; *Tanner v. Niles*, 1 Barb. 560. Com-pare *Green v. Putnam*, 1 Barb. 500.

5 *Brownson v. Gifford*, 8 How. Pr. 389. See *Disbrow v. Folger*, 5 Abb. Pr. 54; *Doe v. Prettyman*, 1 Houst. 334.

6 *Rosekrans v. White*, 7 Lans. 486.

7 *Lyon v. Register*, 36 Fla. 273; *Nelson v. Haisley*, 39 Fla. 145. See *Grant v. Murphy*, 116 Cal. 427, 58 Am. St. Rep. 188.

8 *Terrell v. Weymouth*, 32 Fla. 255, 37 Am. St. Rep. 94.

**§ 370. Judgment or Decree in Partition.**

The judgment or decree awarding partition must set forth the estate and interest of each party,<sup>1</sup> and point out the manner in which the partition shall be made.<sup>2</sup> And a simple order that "partition be awarded" is void.<sup>3</sup> If the estate consists of distinct kinds of property, a part of each kind should be assigned in severalty, if this can be done without impairing the value of the estate.<sup>4</sup> If the common estate consists of several parcels, the entire share of one tenant in common applying for partition may be set off if practicable, leaving the residue undivided.<sup>5</sup> It is held that there may be a partition of standing timber;<sup>6</sup> so of a mill and mill privilege.<sup>7</sup> But a sawmill, millyard, millpond, and the utensils of the mill, are held not to be proper subjects of partition.<sup>8</sup> So the partition of land valuable chiefly as ore bed was denied.<sup>9</sup> Upon a partition of land, improvements should, together with the lands on which they are erected, be set aside to the cotenant who erected them,<sup>10</sup> and without making any allowance against him for the increase in value occasioned by his improvements.<sup>11</sup> Nor is it any objection to an allowance for improvements that they were made by tenants in common in reversion, during the continuance of a previous life estate.<sup>12</sup> Where the bill for partition prays for general relief, the decree may direct an account of the rents and profits.<sup>13</sup> If the land

cannot be properly divided, and a sale is necessary, the court may adjust and secure the rights of the parties in the proceeds of the sale, whether such rights be legal or equitable.<sup>14</sup> A judgment of partition establishes the title and concludes the parties.<sup>15</sup> It is equivalent to an ordinary conveyance,<sup>16</sup> and is notice to purchasers of the land embraced in the shares.<sup>17</sup> It cannot be attacked collaterally;<sup>18</sup> but a decree of partition bad in part is bad as to the whole.<sup>19</sup>

1 Ledbetter v. Gash, 8 Ired. 462; Kilgour v. Crawford, 51 Ill. 249.

2 Harrell v. Harrell, 12 La. Ann. 549; Young v. Frost, 1 Md. 377.

3 Greenup v. Sewell, 18 Ill. 53; and see Tibbs v. Allen, 27 Ill. 119.

4 Hay v. Estell, 19 N. J. Eq. 133.

5 Gordon v. Pearson, 1 Mass. 323; Hagar v. Wiswall, 10 Pick. 152; Shull v. Kennon, 12 Ind. 34; Abbott v. Berry, 46 N. H. 369.

6 Steedman v. Weeks, 2 Strob. Eq. 145.

7 Hansen v. Willard, 12 Me. 142, 28 Am. Dec. 162; Warren v. Westbrook Mfg. Co., 88 Me. 58, 51 Am. St. Rep. 372; and compare Hills v. Dey, 14 Wend. 204; Morrill v. Morrill, 5 N. H. 134; Bailey v. Rust, 15 Me. 440; Munroe v. Gates, 42 Me. 178.

8 Brown v. Turner, 1 Aiken, 67, 15 Am. Dec. 669.

9 Conant v. Smith, 1 Aiken, 67, 15 Am. Dec. 669; and see Boston Franklinite Co. v. Condit, 19 N. J. Eq. 394.

10 Nelson v. Clay, 7 J. J. Marsh. 138, 23 Am. Dec. 387; Seale v. Soto, 35 Cal. 102; Ford v. Knapp, 102 N. Y. 135; 55 Am. Rep. 782; Donnor v. Quartermas, 90 Ala. 164, 24 Am. St. Rep. 778; and see Patrick v. Marshall, 2 Bibb, 40, 4 Am. Dec. 670.

11 Nelson v. Clay, 7 J. J. Marsh. 138, 23 Am. Dec. 387.

12 Hall v. Piddock, 21 N. J. Eq. 311.

13 *Humphrey v. Foster*, 13 Gratt. 653.

14 *Gregory v. Gregory*, 69 N. C. 522; *Milligan v. Poole*, 35 Ind. 64. See *Prentice v. Janssen*, 79 N. Y. 478; *Brendel v. Klopp*, 69 Md. 1; *Coffin v. Argo*, 134 Ill. 276; *Corrothers v. Jolifee*, 32 W. Va. 562, 25 Am. St. Rep. 836; *Brown v. Cooper*, 98 Iowa, 444, 60 Am. St. Rep. 190.

15 *Mills v. Witherington*, 2 Dev. & B. 434; *Colton v. Smith*, 11 Pick. 311, 22 Am. Dec. 275; *Jenkins v. Fahey*, 73 N. Y. 355; *Morrill v. Morrill*, 20 Or. 96, 23 Am. St. Rep. 95.

16 *Anderson v. Hughes*, 5 Strob. 74.

17 *Richards v. Rote*, 68 Pa. St. 253; *Wilson v. Smith*, 22 Gratt. 493; *Marshall v. McLean*, 3 G. Greene, 363. The judgment determines the right of possession, but does not vest in either of the parties any new or additional title in the share set off to each: *Wade v. Deray*, 50 Cal. 376; *Pierce v. Oliver*, 13 Mass. 211; *Mound City etc. Assn. v. Philip*, 64 Cal. 495; *Christy v. Water Works*, 60 Cal. 75; *Richardson v. Loupe*, 80 Cal. 503; *Gullett v. Miller*, 106 Ind. 77; *Board of Commrs. v. Wiley*, 10 Or. 90; *Simmons v. Spratt*, 26 Fla. 463. A deed of partition does not affect the title of the parties, but only fixes the boundaries: *Goundie v. Northampton etc.*, 7 Pa. St. 233.

18 *Wright v. Marsh*, 2 G. Greene, 94; *Merklein v. Trapnell*, 34 Pa. St. 42, 75 Am. Dec. 634; *Morrill v. Morrill*, 20 Or. 96 23 Am. St. Rep. 95.

19 *Corwithe v. Griffing*, 21 Barb. 9.

### § 370a. Same—Continued.

A valid decree or judgment in partition is as conclusive between the parties upon all the material issues in the cause which the court was called upon to examine, and which under the pleadings were tried and determined, as are judgments in other actions.<sup>1</sup> Such decree severs the unity of possession, and each tenant in common becomes entitled to the exclusive possession of that part



of the premises which is allotted to him, and is concluded as to all rights in other parts, irrespective of adverse possession of such parts by those to whom they were allotted.<sup>2</sup> And a decree in partition rendered pursuant to a valid agreement between the parties interested is conclusive, in the absence of fraud.<sup>3</sup> It is, however, held that a decree which does not adjudicate the interests of the respective parties to the suit for partition is ordinarily erroneous.<sup>4</sup> Under the Massachusetts statute, a person not named in a petition for partition cannot appear and answer after a trial upon the merits, unless he shows that he has some estate or interest in the realty in question.<sup>5</sup>

1 *Habig v. Dodge*, 127 Ind. 31; *Finley v. Cathcart*, 149 Ind. 470, 63 Am. St. Rep. 292, and note.

2 *Richardson v. Loupe*, 80 Cal. 492; and so, to same effect, *Williams v. Westcott*, 77 Iowa, 332, 14 Am. St. Rep. 287; *Gates v. Salmon*, 35 Cal. 576, 95 Am. Dec. 139; *Martin v. Walker*, 58 Cal. 594; *Morrill v. Morrill*, 20 Or. 96, 23 Am. St. Rep. 95.

3 *Betts v. Simons* (Tex. Civ. App.), 35 S. W. Rep. 50. See sec. 367a, ante.

4 *Emeric v. Alvarado*, 64 Cal. 529; *Grant v. Murphy*, 116 Cal. 427, 58 Am. St. Rep. 188; *Stevens v. McCormick*, 90 Va. 735.

5 *Fales v. Fales*, 148 Mass. 42.

### § 370b. Same—Improvements, etc.

A cotenant who improves the common property at his own expense can, in a partition suit, have compensation, though his cotenant did not consent to the improvement nor promise to pay

therefor.<sup>1</sup> But if one tenant claims reimbursement for improvements made while in possession, the other tenants may set up a counterclaim for rents and profits due them, and received by the tenant in possession prior to making the improvements, and the court must take such rents and profits into account in making the adjustment.<sup>2</sup> A lien for owelty of partition partakes of the nature of the vendor's lien, and follows the land into whosoever hands it may come. This lien is not released by taking the personal obligation of another, or other security for its payment, nor is it merged by a judgment or decree therefor, but subsists until it is clearly shown to have been waived, or released, or has been satisfied.<sup>3</sup> The sum directed to be paid to make the partition equal is called owelty.<sup>4</sup>

1 *Buck v. Martin*, 21 S. C. 590, 53 Am. Rep. 702; *Killmer v. Wuchner*, 79 Iowa, 722, 18 Am. St. Rep. 392; *Ballou v. Ballou*, 94 Va. 350, 64 Am. St. Rep. 733. See also, as to allowance for improvements: *Appeal of Kelsey*, 113 Pa. 119, 57 Am. Rep. 444; *Brown v. Cooper*, 98 Iowa, 444, 60 Am. St. Rep. 190; secs. 362, 370, ante.

2 *Peden v. Cavins*, 134 Ind. 494, 39 Am. St. Rep. 276. And see, as to accounting for rents and profits in a suit for partition: *Holloway v. Holloway*, 97 Mo. 628, 10 Am. St. Rep. 339; *Bates v. Hamilton*, 144 Mo. 1, 66 Am. St. Rep. 407; also, secs. 360, 362, ante.

3 *Coles v. Withers*, 33 Gratt. 186; *Jameson v. Rixey*, 94 Va. 342, 64 Am. St. Rep. 726; *Dobbin v. Rex*, 106 N. C. 444.

4 *Cooter v. Dearborn*, 115 Ill. 509.

**§ 371. Warranty in Partition Deeds.**

Where partition has been made by law, each partitioner becomes the warrantor of the other to the extent of the portion allotted to him, whether there be an express warranty in the deed or not.<sup>1</sup> And since a warrantor is barred or estopped to claim against his own warranty,<sup>2</sup> it follows that no party to a partition can be permitted to assert an adverse title for the purpose of ousting another party from his portion allotted to him by the same partition.<sup>3</sup> A tenant in common is not permitted, even after partition made, to purchase in a superior outstanding claim for his own exclusive benefit, and much less to use it for the expulsion of his cotenant.<sup>4</sup> Such a purchase is considered in equity as inuring to the benefit of all the cotenants, though the purchaser is entitled to contribution.<sup>5</sup> The benefit of implied warranty in partition is confined to the parties to the partition and their heirs, and does not, as in the case of an express warranty, extend to their vendees.<sup>6</sup>

1 Walker v. Hall, 15 Ohio St. 362, 86 Am. Dec. 482; Venable v. Beauchamp, 3 Dana, 321, 28 Am. Dec. 74. Warranty of title is implied in partition deed between tenants in common taking by descent in Pennsylvania: Patterson v. Lanning, 10 Watts, 135, 36 Am. Dec. 154; and see Seaton v. Barry, 4 Watts & S. 185. See Grigsby v. Peak, 68 Tex. 235, 2 Am. St. Rep. 487, as to implied warranty in partition.

2 See sec. 317. ante.

3 Venable v. Beauchamp, 3 Dana, 321, 28 Am. Dec. 74.

4 Venable v. Beauchamp, 3 Dana, 321, 28 Am. Dec. 74; Davis v. King, 87 Pa. St. 261; Swinburne v. Swinburne, 28 N. Y. 568; Titsworth v. Stout, 49 Ill. 78, 95 Am. Dec. 577; Funk v. Newcomer, 10 Md. 301.

5 Sneed v. Atherton, 6 Dana, 276, 32 Am. Dec. 70; Rothwell v. Dewees, 2 Black, 613; Mandeville v. Solomon, 39 Cal. 125. Compare Dubois v. Campan, 24 Mich. 300; Buchanan v. King, 22 Gratt. 414; Flinn v. McKinley, 44 Iowa, 68; Bracken v. Cooper, 80 Ill. 221; and see sec. 359b, ante.

6 Jones v. Bigstaff, 95 Ky. 395, 44 Am. St. Rep. 245.

### § 371a. Revocation of Partition.

Where, after a parol partition, one tenant, with the consent of his cotenant, disregards such partition and executes a mortgage on the undivided one-half of the land, this is a revocation of such partition as between the parties to the mortgage.<sup>1</sup>

1 Nave v. Smith, 95 Mo. 596, 6 Am. St. Rep. 79

## CHAPTER XXVIII.

### SALE AND PURCHASE OF LANDS.

- § 372. Nature of contract.
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- § 406. Notice of equities.

## § 372. Nature of Contract.

Contracts for the purchase and sale of land are in their nature executory,<sup>1</sup> not vesting any present title;<sup>2</sup> and herein they are distinguished from actual executed conveyances of the land passing title.<sup>3</sup> And whether an agreement for the sale of land is a present conveyance passing title, or is merely executory, is a question to be determined from the intention of the parties, as collected from the whole instrument.<sup>4</sup> But, as a general rule, the acceptance of a deed in pursuance of the terms of a contract for the sale of land is *prima facie* an execution of the contract, which thereby becomes void and of no further effect.<sup>5</sup> So, in equity, contracts for the sale of land

are treated as if they had been executed.<sup>6</sup> The purchaser is regarded as owner of the land and the vendor as owner of the purchase money, and as seised in trust for the purchaser;<sup>7</sup> and the trust attaches to the land so as to bind everyone claiming through the vendor with notice.<sup>8</sup> But at law, a mere equitable title is not regarded, and is unavailing for a recovery or defense against the legal title.<sup>9</sup> The effect of giving a bond for title, upon the sale of land, is to vest in the vendee the equitable title.<sup>10</sup> The purchaser under a contract for the sale of land is held to be the equitable owner, and is liable to all loss that may befall the property, including the loss of the buildings by fire.<sup>11</sup> For the purposes of insurance, he may be said to be invested with the entire, unconditional, and sole ownership.<sup>12</sup> But it is held that an obligee in a bond for a deed, who has paid no part of the purchase price of the land, has no interest therein which can be levied upon under execution, nor any interest to which a judgment lien can attach.<sup>13</sup> In general terms, the relations between vendor and vendee under an executory contract for the purchase and sale of land are, in legal effect, the same as those existing between mortgagor and mortgagee as to mutual, legal, and equitable rights and remedies.<sup>14</sup> A deed executed and delivered without being acknowledged or attested is inoperative except as an agreement to convey.<sup>15</sup>

1 *Stewart v. Lang*, 37 Pa. St. 201, 78 Am. Dec. 414; *Atwood v. Cobb*, 16 Pick. 231, 26 Am. Dec. 657; *Bull v. Willard*, 9 Barb. 641; *Bennett v. Fuller*, 29 La. Ann. 663.

2 *Stewart v. Lang*, 37 Pa. St. 201; *Willey v. Day*, 51 Pa. St. 51, 88 Am. Dec. 562.

3 *Lau v. Mumma*, 43 Pa. St. 267; *Bull v. Willard*, 9 Barb. 641.

4 *Bortz v. Bortz*, 48 Pa. St. 382, 86 Am. Dec. 603; *Shirley v. Shirley*, 59 Pa. St. 267.

5 *Bull v. Willard*, 9 Barb. 641; *Houghtaling v. Lewis*, 10 Johns. 297; *Bryan v. Swain*, 56 Cal. 616; *Keator v. Coal Co.*, 3 Colo. App. 192; *Slocum v. Bracy*, 55 Minn. 249, 43 Am. St. Rep. 499; *Davenport v. Whisler*, 46 Iowa, 287.

6 *Linscott v. Buck*, 33 Me. 530; *Bodley v. Ferguson*, 30 Cal. 511; *King v. Ruckman*, 21 N. J. Eq. 599; *Reed v. Lukens*, 44 Pa. St. 200, 84 Am. Dec. 425; *Siter's Appeal*, 26 Pa. St. 180; *Lombard v. Chicago etc. Cong.*, 64 Ill. 481.

7 *Linscott v. Buck*, 33 Me. 530; *Cary v. Whitney*, 48 Me. 516; *Morgan v. Scott*, 26 Pa. St. 51; *Baldwin v. Pool*, 74 Ill. 97; *Den v. Dellinger*, 75 N. C. 300; and see *Robertson v. Read*, 52 Ark. 381, 20 Am. St. Rep. 188; *Smith v. Insurance Co.*, 91 Cal. 323, 25 Am. St. Rep. 191; *Burke v. Johnson*, 37 Kan. 337, 1 Am. St. Rep. 252 and note. One who has given bond to convey becomes, in equity, a trustee for the purchaser: *Swepson v. Rouse*, 65 N. C. 34, 6 Am. Rep. 735.

8 *Reed v. Lukens*, 44 Pa. St. 200, 84 Am. Dec. 425; *McKechnie v. Sterling*, 48 Barb. 334; *Townsend v. Bissell*, 4 Hun, 300.

9 *Brill v. Stiles*, 35 Ill. 305.

10 *Robertson v. Read*, 52 Ark. 381, 20 Am. St. Rep. 188.

11 *Reed v. Lukens*, 44 Pa. St. 200, 84 Am. Dec. 425; *Elliott v. Fire Ins. Co.*, 117 Pa. St. 548, 2 Am. St. Rep. 703; and see *Smith v. Phoenix Ins. Co.*, 91 Cal. 323, 25 Am. St. Rep. 191.

12 *Id.*; *Imperial Fire Ins. Co. v. Dunham*, 117 Pa. St. 460, 2 Am. St. Rep. 686.

13 *Sweeney v. Pratt*, 70 Conn. 274, 66 Am. St. Rep. 101.



14 Bizzell v. Nix, 60 Ala. 281, 31 Am. Rep. 38; Moses v. Johnson, 88 Ala. 517, 16 Am. St. Rep. 58; Killebrew v. Hines, 104 N. C. 182, 17 Am. St. Rep. 672.

15 Branch v. Smith, 114 Ala. 463.

### § 372a. Option to Purchase.

An option to buy real property is held to be a substantial interest in land, and when the option is exercised the purchaser is considered as the owner *ab initio*.<sup>1</sup> A naked option to buy lands is not, however, such a contract as is favored in equity, and the want of mutuality may generally be urged as a bar to its specific performance.<sup>2</sup> The general rule is, that a contract for the sale of land must bind both parties, or it will bind neither.<sup>3</sup>

1 People's etc. Ry. Co. v. Spencer, 156 Pa. St. 85, 36 Am. St. Rep. 22; and see Frick's Appeal, 101 Pa. St. 485; Ross v. Parks, 93 Ala. 153, 30 Am. St. Rep. 47.

2 Graybill v. Brugh, 89 Va. 895, 37 Am. St. Rep. 894. Compare Gustin v. School District, 94 Mich. 502, 34 Am. St. Rep. 361; Coleman v. Applegarth, 68 Md. 21, 6 Am. St. Rep. 417; Ide v. Leiser, 10 Mont. 5, 24 Am. St. Rep. 17; Warren v. Costello, 109 Mo. 338, 32 Am. St. Rep. 669; Calanchini v. Branstetter, 84 Cal. 249.

3 Atlee v. Bartholomew, 69 Wis. 43, 5 Am. St. Rep. 103; Glass v. Rowe, 103 Mo. 513.

### § 373. What Constitutes the Contract.

A contract for the purchase and sale of land requires a concurrence of will on the part of both vendor and purchaser.<sup>1</sup> And a mere offer by the vendor to sell, unless it be unqualifiedly accepted by the purchaser according to its terms, imposes no obligation, and will not be specifically

enforced.<sup>2</sup> Thus, if A signs a writing, declaring that he will sell to B his house, etc., at a certain price, etc., this is a mere proposition, and not a contract.<sup>3</sup> But if the purchaser accepts the proposition of the vendor, and pays money to bind the bargain, the contract thereby becomes complete, and the vendor cannot afterward impose new terms or conditions;<sup>4</sup> and if he refuses to convey, a specific performance of the contract will be enforced against him and a subsequent purchaser with notice.<sup>5</sup> So, a contract for the sale of land may be the result of a correspondence by letters.<sup>6</sup> And where A proposed by letter to sell land to B, and B answered, accepting on the terms proposed, the sale was held to be complete the moment that B's letter of acceptance was mailed.<sup>7</sup> And if the letters be written by the agents of the respective parties, it is sufficient.<sup>8</sup> But where letters are stated as the agreement for the purchase and sale of land, no testimony aliunde is admissible;<sup>9</sup> but it is otherwise where stated as evidence of the agreement only.<sup>10</sup>

1 *Erwin v. Bank of Kentucky*, 5 La. Ann. 1; *Eliason v. Henshaw*, 4 Wheat. 228; *Vicksburg etc. R. R. Co. v. Hamilton*, 15 La. Ann. 521; and see *Kyle v. Kavanagh*, 103 Mass. 356, 4 Am. Rep. 560.

2 *Holland v. Eyre*, 2 Sim. & St. 194; *Huddleston v. Briscoe*, 11 Ves. 583; *Barrow v. Ker*, 10 La. Ann. 120; *Cammeyer v. United German Lutheran Churches*, 2 Sand. Ch. 186; *Kennedy v. Gramling*, 33 S. C. 367, 26 Am. St. Rep. 676.

3 *Tucker v. Woods*, 12 Johns. 190, 7 Am. Dec. 305; and see *Burns v. Allen*, 11 Ired. 25.

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4 Keegan v. Williams, 22 Iowa, 378; and see Doyle v. Teas, 5 Ill. 202.

5 Keegan v. Williams, 22 Iowa, 378.

6 Dunlop v. Higgins, 1 H. L. Cas. 381; Holland v. Eyre, 2 Sim. & St. 194; New York etc. R. R. Co. v. Pixley, 19 Barb. 428. Compare Dodge v. Lean, 13 Johns. 508; Gartrell v. Stafford, 12 Neb. 545, 41 Am. Rep. 767.

7 Moore v. Pierson, 6 Iowa, 279, 71 Am. Dec. 409. But where a letter is addressed to another, inquiring if he is the owner of certain real estate and the price thereof, to which he responds, stating the price at which he holds it, such response will not be construed as a proposition of sale: Knight v. Cooley, 34 Iowa, 218. Compare Kennedy v. Gramling, 33 S. C. 367, 26 Am. St. Rep. 676.

8 Cowley v. Watts, 17 Jur. 172; 17 Eng. L. & Eq. 147.

9 Birce v. Bletchley, 6 Madd. 17. Compare Huddleston v. Briscoe, 11 Ves. 583.

10 Birce v. Bletchley, 6 Madd. 17.

### § 374. Parties to Contract.

Competent existing parties constitute one of the essential features of a contract for the purchase and sale of land, and where there is nothing in the instrument itself nor in the nature of the transaction which shows who are the parties, the contract is to be deemed void for uncertainty.<sup>1</sup> But the parties need not be expressly named,<sup>2</sup> nor is it essential in every case that the party to whom final conveyance is to be made should, at the time, be distinctly ascertained.<sup>3</sup> Thus, a bond for the conveyance of lands to a board not in esse, given for a proper consideration, was held not to be void for the want of a grantee.<sup>4</sup> The heirs of a vendor, whether adult or infant,"

and although not named in the contract, are bound to fulfill the contract to the extent of the estate that descends to them.<sup>6</sup> And where a vendor dies before performance of the contract, leaving an only child as his heir at law, who is a lunatic, equity may decree a specific performance of the contract, and may direct the committee of the lunatic to execute all necessary conveyances for the purpose.<sup>7</sup> If the vendee assign the contract, and his assignee takes possession, the vendor, though he cannot compel the assignee to pay the purchase money, may, by virtue of his lien on the land, call on him to pay the money, or to surrender the possession of the land, or to have it sold for the benefit of the vendor.<sup>8</sup> At common law, an agreement by a married woman for the sale of her land is void, even if entered into with the assent of her husband;<sup>9</sup> and such agreement will not be enforced against her in equity.<sup>10</sup> As a general rule, she can bind her interest in lands only in the precise mode prescribed by law.<sup>11</sup> But the husband can give a lease for a term of years of lands owned in fee by the wife, which will be valid during the coverture at least,<sup>12</sup> and an agreement to give such a lease, if otherwise unobjectionable, may be enforced in equity.<sup>13</sup> In Massachusetts it is held that an agreement by a husband to convey land with a release of his wife's dower and homestead may be enforced against him so far as he has power to execute it,

with compensation in damages if the wife refuses to join.<sup>14</sup> A verbal authority to an agent to make a contract relative to the sale of lands is held to be valid, and not within the statute of frauds.<sup>15</sup> But the execution of a deed by an agent will not be valid unless authorized by an instrument under seal, or done in the actual presence of the principal.<sup>16</sup> And where a power of attorney to convey lands has been given, verbal directions to the agent can confer no new authority, nor enlarge that contained in the power.<sup>17</sup> In California, specific performance cannot be compelled of an unacknowledged executory contract of a married woman to convey her separate property.<sup>18</sup>

1 Webster v. Ela, 5 N. H. 540.

2 Green v. Davies, 4 Barn. & C. 235; Brown v. Gilman, 13 Mass. 158; Webster v. Ela, 5 N. H. 540.

3 Hilliard on Vendors, 51.

4 Sargeant v. State Bank of Indiana, 12 How. 371; and see sec. 290, ante.

5 Sutphen v. Fowler, 9 Paige, 280.

6 Hill v. Ressegieu, 17 Barb. 162.

7 Swartwout v. Burr, 1 Barb. 495.

8 Champion v. Brown, 6 Johns. Ch. 398, 10 Am. Dec. 343. The assignee of a contract for the purchase of land takes it subject to its infirmities, and acquires no greater rights than the assignor had: Parmly v. Buckley, 103 Ill. 115.

9 Butler v. Buckingham, 5 Day, 492, 5 Am. Dec. 174.

10 Butler v. Buckingham, 5 Day, 492, 5 Am. Dec. 174; and see Aylett v. Ashton, 1 Mylne & C. 105. Equity will not decree a specific performance of a contract by husband and wife to sell her land, as against her: Clarke v. Reins, 12 Gratt. 98.

11 *Dunlap v. Mitchell*, 10 Ohio, 117; *Bresslor v. Kent*, 61 Ill. 426, 14 Am. Rep. 67; *Farthing v. Shields*, 106 N. C. 289; and see sec. 283, ante.

12 *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586.

13 *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586.

14 *Park v. Johnson*, 4 Allen, 259; *Davis v. Parker*, 14 Allen, 94. A husband agreed to sell land, but the wife, without collusion with him, refused to join in the deed. It was held that the vendee could not compel a specific performance by the husband alone, and retain part of the purchase money as indemnity against the wife's contingent claim of dower: *Burk's Appeal*, 75 Pa. St. 141, 15 Am. Rep. 587. In an action for a breach of the contract it was held that compensatory damages only were recoverable: *Burk v. Serrill*, 80 Pa. St. 413, 21 Am. Rep. 105.

15 *Johnson v. M'Gruder*, 15 Mo. 365; *Ledbetter v. Walker*, 29 Ala. 176; *Marston v. Roe*, 8 Ad. & E. 15; *Coleman v. Garrigues*, 18 Barb. 60. But compare *Vanhorn v. Frick*, 6 Serg. & R. 90.

16 *Kime v. Brooks*, 9 Ired. 218; and see sec. 294, ante.

17 *Spofford v. Hobbs*, 29 Me. 148, 48 Am. Dec. 521.

18 *Jackson v. Torrence*, 83 Cal. 521. Competency of married woman, under Maryland laws, to execute, with her husband, a power of attorney to convey her lands in the District of Columbia: See *Williams v. Paine*, 169 U. S. 55.

## § 375. Consideration.

One of the elements of a contract for the purchase and sale of land is some valuable consideration, without which the contract cannot in general stand.<sup>1</sup> But it is not necessary that the consideration should be a cash payment.<sup>2</sup> Thus, a note given for the purchase money will be deemed a sufficient consideration for a bond to convey.<sup>3</sup> So the possession of lands is an adequate consid-

eration to support a promise to pay the price therefor.<sup>4</sup> A covenant that the grantee would support the grantor during life is a valuable consideration.<sup>5</sup> So a vendor's promise to indemnify the vendee for his improvements, if the title warranted fails, is founded on sufficient consideration, and will support assumpsit.<sup>6</sup> And a covenant by the vendee to erect a brick building upon the land within a certain time is held to be a valid consideration for the covenant to sell.<sup>7</sup> But the owner of land is under no obligation to pay for work or labor done upon it by one who has entered without his consent or any color of right, and held possession against him, and a promise thus to pay is without consideration and void.<sup>8</sup> A negotiable promissory note is a valuable consideration in a sale of land.<sup>9</sup> But actual payment of the purchase money, or what is equivalent thereto, before notice of outstanding equities, is necessary to the protection of a subsequent purchaser, and the execution and delivery of negotiable paper which remains unnegotiated in the hands of the grantor is not such an equivalent.<sup>10</sup> Settlement of past differences on the basis of the purchase and sale of land at a value to be fixed by appraisers is a valid consideration for the agreement to purchase and sell, and sufficient to render the contract irrevocable.<sup>11</sup> An option to purchase land, limited to a certain time for a certain consideration, cannot be extended beyond

that time by contract without a new consideration.<sup>12</sup>

1 *Gorham v. Herrick*, 2 Me. 87; *Burling v. King*, 66 Barb. 633; *Dorsey v. Packwood*, 12 How. 126; *Andriot v. Lawrence*, 33 Barb. 142; *Greene v. Allen*, 32 Ala. 215; *Smith v. Ware*, 13 Johns. 257; and see sec. 292, ante.

2 *Pierce v. Woodward*, 6 Pick. 206; *Whiteside v. Jennings*, 19 Ala. 784. Mutual promises to convey constitute a sufficient consideration: *Murphy v. Rooney*, 45 Cal. 78; and see *Curlin v. Hendricks*, 35 Tex. 225.

3 *Whiteside v. Jennings*, 19 Ala. 784; and see *Eldridge v. Turner*, 10 Ala. 1049; *Doyle v. Teas*, 5 Ill. 202. The consideration for a contract to sell land may be valid, although the vendee does not expressly stipulate to buy or pay for the land: *Eno v. Woodworth*, 4 N. Y. 249, 53 Am. Dec. 370. But an offer to sell land at a certain price is an offer to sell for cash, and the acceptance of such offer must be absolute, and not qualified or limited by conditions: *Cammeyer v. United German Lutheran Churches*, 2 Sand. Ch. 186; and see *Maynard v. Tabor*, 53 Me. 511; *Sennett v. Shehan*, 27 Minn. 328.

4 *Parker v. Crane*, 6 Wend. 647; *Hart v. Young*, 1 Lans. 419; and see *Lorentz v. Lorentz*, 14 W. Va. 761.

5 *Stewart v. Redditt*, 3 Md. 67; and see *Watson v. Smith*, 7 Or. 448; *Hyatt v. Williams*, 72 Mo. 214, 37 Am. Rep. 438.

6 *Richardson v. Gosser*, 26 Pa. St. 336.

7 *Brewer v. Bessinger*, 25 Miss. 86.

8 *Frear v. Hardenbergh*, 5 Johns. 272, 4 Am. Dec. 356; and see *McFarland v. Mathis*, 10 Ark. 560. Specific performance may be decreed in favor of a purchaser, though the whole consideration be not stated in the contract, if he is willing to pay the whole: *Park v. Johnson*, 4 Allen, 259.

9 *Weaver v. Nugent*, 72 Tex. 272, 13 Am. St. Rep. 792.

10 *Kitteridge v. Chapman*, 36 Iowa, 348; *Fluegel v. Henschel*, 7 N. Dak. 276, 66 Am. St. Rep. 642; and see *Rush v. Mitchell*, 71 Iowa, 333; *Arnholt v. Hartwig*, 73 Mo. 487; *Partridge v. Chapman*, 81 Ill. 137; *Davis v. Ward*, 109 Cal. 186, 50 Am. St. Rep. 29.



11 *Guild v. Topeka etc. R. R. Co.*, 57 Kan. 70, 57 Am. St. Rep. 312.

12 *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17, and note.

### § 376. Auction Sales.

Lands are frequently disposed of at auction, which is a public sale of property to the highest bidder.<sup>1</sup> The person who conducts the sale is called an auctioneer, and the auction may be by public outcry or otherwise.<sup>2</sup> It is not necessary that a person should be present at an auction to become a purchaser, but he may make his bid by letter.<sup>3</sup> A mere verbal authority sufficiently authorizes an agent to act as auctioneer and to sell lands, but not to make a deed of them.<sup>4</sup> Nor can an auctioneer delegate his authority to sell to another;<sup>5</sup> but he may employ another to use the hammer and make the outcry under his immediate direction and supervision;<sup>6</sup> and he may employ all necessary and proper assistants.<sup>7</sup> As soon as a sale is perfected the agency of the auctioneer ceases.<sup>8</sup> And in no case can he, under his authority as auctioneer, negotiate a private sale after failure at an auction sale.<sup>9</sup> A sale at auction is within the provisions of the statute of frauds, and requires a memorandum in writing in order to bind both parties to the contract.<sup>10</sup> But this memorandum, duly made and signed by the auctioneer, is sufficient.<sup>11</sup> He acts as the agent of the purchaser as well as that of the

vendor.<sup>12</sup> But the memorandum must be made and signed by the auctioneer at the time of the sale, and before the termination of the proceedings, or the purchaser will not be bound.<sup>13</sup> And an auctioneer who is himself the vendor and party in interest has no authority to sign a memorandum to take the sale out of the statute.<sup>14</sup> As a general rule, the employment of puffers or by-bidders for the purpose of running up the property by fictitious bids is deemed against public policy, and avoids an auction sale.<sup>15</sup> The buyer at such a sale may be relieved from his purchase;<sup>16</sup> unless, after knowledge of the facts, he took possession and allowed a confirmation of the sale;<sup>17</sup> or unless the price was not exorbitant, and there had been a long acquiescence by the buyer.<sup>18</sup> So if persons be employed to bid up to a certain sum in order to avoid a sacrifice of the property, and the price is afterward raised by real bidders, the sale will be sustained.<sup>19</sup> And merely to employ a person to "bid in" for the owner does not necessarily vitiate an auction sale, if the price is not intended to be thereby enhanced beyond a fair value;<sup>20</sup> and whether the by-bidder is employed in good faith to prevent a sacrifice, or simply to enhance the price by a pretended competition, is held to be a question for the jury.<sup>21</sup> Lands may be leased as well as sold at auction.<sup>22</sup> Where a purchase of land at auction is induced by the misrepresentations of the auctioneer as to

the quantity of the land, the purchaser is not bound by his bid, and may recover back any payment made by him on the purchase.<sup>23</sup>

1 See *Walker v. Advocate General*, 1 Dow, 114.

2 *State v. Conkling*, 19 Cal. 501; *State v. Rucker*, 24 Mo. 557; *Hunt v. Philadelphia*, 35 Pa. St. 277; *Walker v. Advocate General*, 1 Dow, 115, 116. See *Crandall v. State*, 28 Ohio St. 479; *Russell v. Miner*, 61 Barb. 534.

3 *Tyree v. Williams*, 3 Bibb, 368, 6 Am. Dec. 603. Compare *Minturn v. Allen*, 3 Sand. 50.

4 *Yourt v. Hopkins*, 24 Ill. 326.

5 *Stone v. State*, 12 Mo. 400; *Snow v. Institution for Savings*, 17 R. I. 66; *Singer Mfg. Co. v. Chalmers*, 2 Utah, 542.

6 *Commonwealth v. Harnden*, 19 Pick. 482, 20 Am. Dec. 534; and see *Poree v. Bonneval*, 6 La. Ann. 386.

7 *Commonwealth v. Harnden*, 19 Pick. 482, 20 Am. Dec. 534.

8 *Nelson v. Aldridge*, 2 Stark. 435; *Boinest v. Leigne*, 2 Rich. 464; *Walker v. Herring*, 21 Gratt. 678, 8 Am. Rep. 616.

9 *Jones v. Nanney*, McClel. 25; 13 Price, 76; *Seton v. Slade*, 7 Ves. 276; *Daniel v. Adams*, Amb. 495.

10 *Brent v. Green*, 6 Leigh, 16; *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248; *Hinde v. Whitehouse*, 7 East, 558; *Springer v. Kleinsorge*, 83 Mo. 152; *Bamber v. Savage*, 52 Wis. 110, 38 Am. Rep. 723; *Higginson v. Clowes*, 15 Ves. 516. See *Adams v. Scales*, 1 Baxt. 337, 25 Am. Rep. 772.

11 *Pike v. Balch*, 38 Me. 302, 61 Am. Dec. 248; *Walsh v. Barton*, 24 Ohio St. 28; *Walker v. Herring*, 21 Gratt. 678, 8 Am. Rep. 616; *McComb v. Wright*, 4 Johns. Ch. 659; *Bird v. Boulter*, 4 Barn. & Adol. 446. Compare *Adams v. Scales*, 57 Tenn. 337.

12 *McComb v. Wright*, 4 Johns. Ch. 659; *Burke v. Haley*, 7 Ill. 614; *Morton v. Dean*, 13 Met. 385; *Springer v. Kleinsorge*, 83 Mo. 152; *Harvey v. Stevens*, 43 Vt. 653.

13 *Horton v. McCarty*, 53 Me. 394; and see *Gathney v. Cason*, 74 N. C. 5, 21 Am. Rep. 484; *Johnson v. Buck*,

35 N. J. L. 338, 10 Am. Rep. 243; *Norris v. Blair*, 39 Ind. 90, 10 Am. Rep. 135.

14 *Bent v. Cobb*, 9 Gray, 397, 69 Am. Dec. 295.

15 *Curtis v. Aspinwall*, 114 Mass. 187, 19 Am. Rep. 332; *Peck v. List*, 23 W. Va. 338, 48 Am. Rep. 398; *Towle v. Leavitt*, 23 N. H. 360, 55 Am. Dec. 195; *Stains v. Shore*, 16 Pa. St. 200, 55 Am. Dec. 492; *Veazie v. Williams*, 3 Story, 611.

16 *National Bank v. Sprague*, 20 N. J. Eq. 159; *Yerkes v. Wilson*, 81 Pa. St. 9.

17 *Backenstoss v. Stahler*, 33 Pa. St. 251, 75 Am. Dec. 592.

18 *Lathan v. Morrow*, 6 B. Mon. 630.

19 *Bramley v. Alt*, 6 Ves. 619; *Steele v. Ellmaker*, 11 Serg. & R. 86; and see *Lee v. Lee*, 19 Mo. 420; *Smith v. Ullman*, 58 Md. 183, 42 Am. Rep. 329; *Moffet v. Ijams*, 103 Pa. St. 266; *Marie v. Garrison*, 83 N. Y. 14; *Micker v. Hoppock*, 6 Wall. 94; *Mortimer v. Bell*, L. R. 1 Ch. App. 10.

20 *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101.

21 *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101; and compare *Ord v. Noel*, 5 Madd. 440; *Fox v. Wright*, 6 Madd. 111.

22 See *Coote v. Coote*, 2 I. R. Eq. 159.

23 *Roberts v. French*, 153 Mass. 60, 25 Am. St. Rep. 611.

## § 377. Statute of Frauds.

At common law, contracts for the purchase and sale of lands are valid, though not in writing.<sup>1</sup> But the English statute (29 Charles II, c. 3), known as the statute of frauds, provides that "no action shall be brought, whereby to charge any person upon any agreement made upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them,

unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."<sup>2</sup> The substance of this statute has been re-enacted in the different states of the Union, and contracts for the sale of lands are thereby required to be in writing.<sup>3</sup> The great purpose of the statute is to afford protection against frauds and perjuries;<sup>4</sup> and this is effected by providing that mere parol proof of such contracts shall be insufficient to establish them in a court of justice.<sup>5</sup> But a contract for the sale of lands need not be under seal;<sup>6</sup> it is enough if it be in writing, and subscribed by the party or his agent lawfully authorized.<sup>7</sup> And the signing of the memorandum of agreement by one party only is sufficient, provided it be the party sought to be charged.<sup>8</sup> And by the words "the party to be charged" in the statute must be understood the defendant in the action;<sup>9</sup> the note or memorandum must be signed by him, but need not be signed by the plaintiff.<sup>10</sup> The party to be charged who has subscribed the contract is estopped by his signature from denying that the contract was validly executed, although not signed by the other party who sues for the performance.<sup>11</sup> Not only is a verbal contract for the sale of lands void, but a verbal agreement by one to purchase an interest in lands for another

is void.<sup>12</sup> So a verbal acceptance of a proposal to exchange lands is inoperative, where there is no memorandum signed by the acceptor showing what lands he agrees to give in exchange.<sup>13</sup> So an oral extension of time within which an offer to sell lands might be accepted cannot be shown.<sup>14</sup> So a verbal agreement between two or more persons to purchase lands for their joint benefit is within the statute of frauds.<sup>15</sup> But it is held that a partnership for buying and selling lands for profit may be created by parol.<sup>16</sup> An oral agreement by the vendee of lands to reconvey is within the statute.<sup>17</sup> So of a verbal promise to make a will devising land to the promisee, in consideration of his present conveyance of the land to the promisor.<sup>18</sup> And so of a verbal promise in the alternative to compensate a party by will, either in land or money.<sup>19</sup>

1 See *Cooch v. Goodman*, 2 Ad. & E., N. S., 580; *Mayberry v. Johnson*, 15 N. J. L. 116; *Allen v. Beal*, 3 A. K. Marsh. 554, 13 Am. Dec. 203.

2 See *Browne on the Statute of Frauds*, App.

3 See *Mayberry v. Johnson*, 15 N. J. L. 116; *Brandeis v. Neustadtt*, 13 Wis. 142; *Jenkins v. Harrison*, 66 Ala. 345; *Haismith v. Castay*, 17 La. Ann. 140; Cal. Civ. Code, sec. 1741; *Marsh v. Hyde*, 3 Gray, 332; *Work v. Cowhick*, 81 Ill. 317; *Williams v. Gibson*, 84 Ala. 228, 5 Am. St. Rep. 368.

4 *Marsh v. Hyde*, 3 Gray, 332; *Norman v. Molett*, 8 Ala. 546; *Welford v. Beazely*, 3 Atk. 503; *Proctor v. Jones*, 2 Car. & P. 534; *Phillips v. Hunnewell*, 4 Me. 380.

5 *Marsh v. Hyde*, 3 Gray, 332; *Atwood v. Cobb*, 16 Pick. 227, 26 Am. Dec. 657.

6 *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; and see *Owen v. Frink*, 24 Cal. 177.

7 Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; Ide v. Stanton, 15 Vt. 685, 40 Am. Dec. 698. In New York an actual manual subscription at the end of the contract is required: Vielie v. Osgood, 8 Barb. 130; James v. Patten, 6 N. Y. 9, 55 Am. Dec. 376; and see Kurtz v. Cummings, 24 Pa. St. 35. But generally the requirement of the statute in this respect has been liberally construed: See Bleakley v. Smith, 11 Sim. 150; Higdon v. Thomas, 1 Har. & G. 130; Anderson v. Harold, 10 Ohio, 399; Caton v. Caton, L. R. 2 H. L. 127; Morison v. Turnour, 18 Ves. 175; Bluck v. Gompertz, 7 Ex. 862.

8 Russell v. Nixon, 3 Wend. 112, 20 Am. Dec. 667; Shirley v. Shirley, 7 Blackf. 452; Thayer v. Luce, 22 Ohio St. 62; Lowber v. Cormit, 36 Wis. 176; Martin v. Mitchell, 2 Jacob & W. 426; Gartrell v. Stafford, 12 Neb. 552, 41 Am. Dec. 767; Tripp v. Bishop, 56 Pa. St. 428; Estes v. Furlong, 59 Ill. 302. Compare Davis v. Shield, 26 Wend. 362.

9 Newby v. Rogers, 40 Ind. 9.

10 Newby v. Rogers, 40 Ind. 9; Smith v. Arnold, 5 Mass. 414; Getchell v. Jewett, 4 Me. 350; Egerton v. Matthews, 6 East, 307; Shirley v. Shirley, 7 Blackf. 452. But compare Jones v. Noble, 3 Bush, 694; Lawrenson v. Butler, 1 Schoales & L. 13.

11 Worrall v. Munn, 5 N. Y. 229, 55 Am. Dec. 330; and see Justice v. Lang, 42 N. Y. 493, 1 Am. Rep. 576.

12 Raub v. Smith, 61 Mich. 543, 1 Am. St. Rep. 619.

13 Wardell v. Williams, 62 Mich. 50, 4 Am. St. Rep. 814.

14 Atlee v. Bartholomew, 69 Wis. 43, 5 Am. St. Rep. 103.

15 Robbins v. Kimball, 55 Ark. 414, 29 Am. St. Rep. 45; Parsons v. Phelan, 134 Mass. 109.

16 Richards v. Grinnell, 63 Iowa, 44, 50 Am. Rep. 727; Pennybacker v. Leary, 65 Iowa, 220; Bates v. Bahcock, 95 Cal. 479, 29 Am. St. Rep. 133; Speyer v. Desjardins, 144 Ill. 641, 36 Am. St. Rep. 473. But see Raub v. Smith, 61 Mich. 543, 1 Am. St. Rep. 619.

17 Crutcher v. Muir, 90 Ky. 142, 29 Am. St. Rep. 366; Ahrend v. Odiorne, 118 Mass. 261, 19 Am. Rep. 449; and see Harrison v. Bailey, 14 S. C. 334.

18 *Manning v. Pippen*, 86 Ala. 357, 11 Am. St. Rep. 46.

19 *Howard v. Brower*, 37 Ohio St. 402; *Patterson v. Cunningham*, 12 Me. 506.

### § 378. Form of Memorandum Under Statute.

The mere form of the writing or memorandum is not important.<sup>1</sup> As a general rule, whenever evidence of the contract is found in writing, signed by the party to be charged, which is certain and definite, there is all the evidence the statute requires.<sup>2</sup> Writings, even letters addressed to third persons, of which the party availing himself as evidence had no knowledge when they were written, and which were not written with any view to the execution, or to furnish evidence of the contract, have been received as evidence to meet the requirements of the statute.<sup>3</sup> So a letter in terms repudiating liability, but admitting the making of the contract, signed by the party to be charged, was received as a sufficient memorandum.<sup>4</sup> It is sufficient to satisfy the statute that the terms of the bargain may be gathered from two or more separate papers, if the signed memorandum contains such reference to the other papers as to make the latter part of the former;<sup>5</sup> but the connection between the signed and unsigned papers cannot be made by parol evidence that they were intended by the parties to be read together, or of facts and circumstances from which such intention may be inferred.<sup>6</sup> An



undelivered deed may, under some circumstances, operate as a note or memorandum of a contract for the sale of lands.<sup>7</sup> And deeds not duly recorded, and for that reason invalid as conveyances, have in some cases been regarded as contracts to convey, and as such enforced.<sup>8</sup> The signature of the purchaser to the conditions of sale made by the auctioneer's clerk, as the bids are publicly announced, is held to be a sufficient signing within the statute.<sup>9</sup> But on a sale at public auction the terms of which were to be a credit of nine months on notes with approved security, waiving valuation and appraisement laws, a memorandum of sale made by the clerk, which did not state such terms, was held to be void under the statute.<sup>10</sup> And, generally, the memorandum must state expressly or by reference the subject of sale, the terms, and the parties, with such certainty as to furnish evidence of a complete agreement.<sup>11</sup> It is not, however, essential that the description of the property should have such particulars and tokens of identification as to render a resort to extrinsic aid entirely needless when the writing comes to be applied to the subject matter.<sup>12</sup> But the terms must be sufficient to fit and comprehend the property which is the subject of the transaction, so that, with the assistance of external evidence, the description, without being contradicted or added to, can be connected with and applied to the very property intended, and to the exclu-

sion of all other property.<sup>13</sup> According to the English decisions, the statute requires that the consideration should be expressed in the writing as part of the agreement;<sup>14</sup> and the same construction has been followed in some of the American decisions,<sup>15</sup> while others hold that the requisitions of the statute are satisfied if the agreement is in writing, though the consideration be not expressed.<sup>16</sup>

1 *Welford v. Beazely*, 3 Atk. 503; *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671; *Jenkins v. Harrison*, 66 Ala. 359; *Stearns v. Edson*, 63 Vt. 259, 25 Am. St. Rep. 758.

2 *Jenkins v. Harrison*, 66 Ala. 345; *Atwood v. Cobb*, 16 Pick. 227, 26 Am. Dec. 657; *Clason v. Bailey*, 14 Johns. 487; *Ide v. Stanton*, 15 Vt. 685, 40 Am. Dec. 698. See *Wiener v. Whipple*, 53 Wis. 298, 40 Am. Rep. 775.

3 *Coles v. Trecothick*, 9 Ves. 250; *Gibson v. Holland*, L. R. 1 Com. P. 1; *Peabody v. Speyers*, 56 N. Y. 230. Compare *Washington Ice Co. v. Webster*, 62 Me. 341, 16 Am. Rep. 462; *Lee v. Cherry*, 85 Tenn. 707, 4 Am. St. Rep. 800; *Smith v. Tuit*, 127 Pa. St. 341, 14 Am. St. Rep. 851.

4 *Bailey v. Sweeting*, 9 Com. B., N. S., 843; and see *Fowle v. Freeman*, 9 Ves. 351; *Dobell v. Hutchinson*, 3 Ad. & E. 355.

5 *Dobell v. Hutchinson*, 3 Ad. & E. 355; *Tawney v. Crowther*, 3 Bro. C. C. 318; *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243.

6 *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243; *Ridgway v. Wharton*, 6 H. L. Cas. 237; *Clinan v. Cooke*, 1 Schoales & L. 22.

7 *Jenkins v. Harrison*, 66 Ala. 358; and see *Bowles v. Woodson*, 6 Gratt. 78; *Parrill v. McKinley*, 9 Gratt. 1, 58 Am. Dec. 212; *Work v. Cowhick*, 81 Ill. 317; *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Dec. 427; *Thayer v. Luce*, 22 Ohio St. 62.

8 *Williams v. Mayor*, 6 Har. & J. 529; *Moncrieff v. Goldsborough*, 4 Har. & McH. 283; and see *Somerville v. Trueman*, 4 Har. & McH. 252, 1 Am. Dec. 398.

9 *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243. Compare *Gwathney v. Casson*, 74 N. C. 5, 21 Am. Rep. 484.

10 *Norris v. Blair*, 39 Ind. 90, 10 Am. Rep. 135.

11 *Johnson v. Buck*, 35 N. J. L. 338, 10 Am. Rep. 243; *Nichols v. Johnson*, 10 Conn. 192; *Davis v. Townsend*, 10 Barb. 333; *Commings v. Scott*, L. R. 20 Eq. 11; 13 Eng. Rep. 576; *Slater v. Smith*, 117 Mass. 96; *Waring v. Ayres*, 40 N. Y. 357; *Mentz v. Newwitter*, 122 N. Y. 491, 19 Am. St. Rep. 514; *Smith v. Jones*, 66 Ga. 338, 42 Am. Rep. 72; *Honeyman v. Marryatt*, 6 H. L. Cas. 112; 21 Beav. 44.

12 *Eggleston v. Wagner*, 46 Mich. 618.

13 *Eggleston v. Wagner*, 46 Mich. 618; and see *Hagan v. Domestic etc. Co.*, 9 Hun, 73; *McMurray v. Spicer*, L. R. 5 Eq. 527; *Ives v. Hazard*, 4 R. I. 14, 67 Am. Dec. 500; *Carpenter v. Medford*, 99 N. C. 495, 6 Am. St. Rep. 535.

14 *Saunders v. Wakefield*, 4 Barn. & Ald. 595.

15 See *Leonard v. Vredenburg*, 8 Johns. 29, 5 Am. Dec. 317; *Neelson v. Sanborne*, 2 N. H. 414, 9 Am. Dec. 108.

16 *Miller v. Irvine*, 1 Dev. & B. 103; *Packard v. Richardson*, 17 Mass. 122, 9 Am. Dec. 123; *Ivory v. Murphy*, 36 Mo. 534; *Rigby v. Norwood*, 34 Ala. 129. The present statute of Alabama requires the expression in writing of the consideration, not leaving it to the uncertainty and infirmity of parol evidence: See *Jenkins v. Harrison*, 66 Ala. 354.

### § 378a. Same—Continued.

The memorandum in writing, sufficient to satisfy the statute of frauds, must be such that when produced in evidence it will inform the court or jury, without parol evidence, of the essential facts set forth in the pleading, and which go to make

a valid contract. These essential facts consist of the subject matter of the sale, the terms, and the names or descriptions of the parties.<sup>1</sup> But the memorandum need not be formal, and any writing, from a solemn deed down to mere hasty notes or memoranda in books, papers, or letters, is held sufficient.<sup>2</sup> If the contract can be extracted from correspondence between the parties, the statute is satisfied.<sup>3</sup> And a letter to a vendor from his agent conveying an offer for land, and his letter in reply to the agent accepting such offer, constitute a memorandum sufficient to satisfy the statute.<sup>4</sup> A memorandum describing the property, and signed by the vendor, is sufficient, although it is not signed by the purchaser.<sup>5</sup> Correspondence and telegrams, taken together, have been held sufficient to constitute a good memorandum.<sup>6</sup> It is sufficient if the land be described as that which the vendee 'is in possession of now.'<sup>7</sup> A memorandum will not satisfy the statute, if it appears therefrom that some of the details of the contract remain to be settled between the parties.<sup>8</sup> A letter to one whom the writer had treated as a son, promising to give him upon his marriage "a house and furnish it," is not a sufficient written memorandum to take the promise out of the statute, the letter containing no contract, or consideration for the promised gift.<sup>9</sup> A defect in the description of the land in the memorandum of sale may be supplied by evidence showing the situation and

surrounding circumstances of the parties, and if it appears that both parties referred to the same property, the requirements of the statute are met, and parol evidence may be resorted to for the purpose of identifying the particular piece of property to which the parties so referred.<sup>10</sup> But the memorandum of sale is held to be insufficient if the precise terms of payment cannot be ascertained therefrom without resorting to parol evidence.<sup>11</sup> A draft for the purchase money of lands, drawn by an agent without disclosing his principal's name, is held a sufficient memorandum under the statute.<sup>12</sup>

1 See *Mentz v. Newwitter*, 122 N. Y. 491, 19 Am. St. Rep. 514; *Drake v. Seaman*, 97 N. Y. 230; *Lincoln v. Preserving Co.*, 132 Mass. 129; *Eppich v. Clifford*, 6 Colo. 493; *Williams v. Robinson*, 73 Me. 186, 40 Am. Rep. 352; *Nibert v. Baghurst*, 47 N. J. Eq. 201; *McGovern v. Hern*, 153 Mass. 308, 25 Am. St. Rep. 633; *Jenkins v. Harrison*, 66 Ala. 345.

2 *Kopp v. Reiter*, 146 Ill. 437, 37 Am. St. Rep. 156.

3 *Hickey v. Dole*, 66 N. H. 336, 49 Am. St. Rep. 614; *Peek v. Peek*, 77 Cal. 106, 11 Am. St. Rep. 244.

4 *Singleton v. Hill*, 91 Wis. 51, 51 Am. St. Rep. 868; *Lee v. Cherry*, 85 Tenn. 707, 4 Am. St. Rep. 800; and see *Peay v. Seigler*, 48 S. C. 496, 59 Am. St. Rep. 731.

5 *Dennis v. Strassburger*, 89 Cal. 584; *Violet v. Rose*, 39 Neb. 660; *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123; *Peay v. Seigler*, 48 S. C. 496, 59 Am. St. Rep. 731; *Gartrell v. Stafford*, 12 Neb. 545, 41 Am. Rep. 767; *Bradford v. Parkhurst*, 96 Cal. 102, 31 Am. St. Rep. 189; *Peevey v. Haughton*, 72 Miss. 918, 48 Am. St. Rep. 592.

6 *Everman v. Herndon*, 71 Miss. 823; and see *Marshall v. Eisen Vineyard Co.*, 21 N. Y. Supp. 468, 1 Misc. Rep. 511.

7 *Phillips v. Swank*, 120 Pa. St. 76, 6 Am. St. Rep. 691; and see further, as to sufficiency of description of the land, *Hurley v. Brown*, 98 Mass. 515, 96 Am. Dec. 671; *St. Paul Land Co. v. Dayton*, 42 Minn. 73; *Mead v. Parker*, 115 Mass. 413, 15 Am. Rep. 110.

8 *Wardell v. Williams*, 62 Mich. 50, 4 Am. St. Rep. 814; and see *Swain v. Burnette*, 89 Cal. 564.

9 *Usher v. Flood*, 83 Ky. 552.

10 *Kennedy v. Gramling*, 33 S. C. 367, 26 Am. St. Rep. 676; *Peay v. Seigler*, 48 S. C. 496, 59 Am. St. Rep. 731; and see *Redd v. Murry*, 95 Cal. 51; *Preble v. Abrahams*, 88 Cal. 245, 22 Am. St. Rep. 301; *Tice v. Freeman*, 30 Minn. 389; sec. 378, ante.

11 *Nelson v. Improvement Co.*, 96 Ala. 515, 38 Am. St. Rep. 116.

12 *Neaves v. Mining Co.*, 90 N. C. 412, 47 Am. Rep. 529.

### § 379. What are Lands Within the Statute.

The word "land" is comprehensive in its meaning, and includes growing grass and standing trees.<sup>1</sup> Contracts for the sale of standing timber are, therefore, held to be contracts for the sale of an interest in land, and must be in writing, under the statute of frauds.<sup>2</sup> So of contracts for the sale of growing crops.<sup>3</sup> But a sale of standing trees in contemplation of their immediate separation from the soil was held not to be embraced within the statute.<sup>4</sup> So a sale of a crop of peaches then growing in the seller's orchard, the buyer to gather and remove the peaches as they matured, was held not to be within the statute as a sale of an interest in land.<sup>5</sup> So hops upon the vine are personal chattels, and may be sold as such.<sup>6</sup> Nor is a contract for the delivery

of hop roots an agreement relating to real estate, and such contract is not within the statute, although at the time the bargain was made the roots were in the ground.<sup>7</sup> A grant of a right to shoot over land, and to take away a part of the game killed, is a grant of an interest in land, and within the statute of frauds.<sup>8</sup> Coal and the right to dig coal are interests in land.<sup>9</sup> So dower, prior to assignment, is an interest in lands within the statute;<sup>10</sup> so of a permanent right to flow land;<sup>11</sup> and possession is held to be an interest in land within the meaning of the statute;<sup>12</sup> and the same has been held in respect to mining claims.<sup>13</sup> But the sale of shares in a mining company, conducted on the cost-book principle, is not a sale of land, or of an interest in land.<sup>14</sup> And sales of lands made by a commissioner under a decree of court are not within the statute, and are valid, though not in writing.<sup>15</sup> And a contract for the sale of improvements on land, consisting of houses, is held not to be within the statute.<sup>16</sup> So of a contract under which one is to make bricks on the land of another, the property in the bricks to remain in the owner of the soil until he has been paid for his clay and wood used and consumed in their manufacture.<sup>17</sup> So of an agreement in a written lease for the renewal thereof, and to pay as rent for such renewal term a certain percentage upon the cash value of the premises, to be fixed by appraisers.<sup>18</sup> And an agreement to return

leased premises in the same condition as when taken is valid though not in writing.<sup>19</sup> So an agreement by a husband to convey certain lands to his wife in consideration that she would relinquish her inchoate interest in his lands, which she did, is valid, though not in writing.<sup>20</sup> And a parol agreement for a partnership for the purpose of dealing in lands is not within the statute, and is valid.<sup>21</sup> An agreement to convey an undivided interest in a partition fence is within the statute of frauds, and must be in writing.<sup>22</sup> So of the sale of an equitable interest in land.<sup>23</sup> It has been held that the location of a mining claim may be authorized by parol, and that the statute of frauds has no application.<sup>24</sup> But it is now held in California that a mining claim is real estate,<sup>25</sup> and under the statute of frauds can be transferred only by operation of law or an instrument in writing.<sup>26</sup> A contract in regard to the loss and profits on the future sale of real estate is not one for an interest in land, and is not within the statute.<sup>27</sup>

1 Buck v. Pickwell, 27 Vt. 157; Owens v. Lewis, 46 Ind. 488. 15 Am. Rep. 295; Rodwell v. Phillips, 9 Mees. & W. 501. Compare Marshall v. Ferguson, 23 Cal. 65.

2 Slocum v. Seymour, 36 N. J. L. 138, 13 Am. Rep. 432; Pierrepont v. Barnard, 5 Barb. 364; Bowers v. Bowers, 95 Pa. St. 477; Carpenter v. Medford, 99 N. C. 495, 6 Am. St. Rep. 535; Hirth v. Graham, 50 Ohio St. 57, 40 Am. St. Rep. 641; Hutchins v. King, 1 Wall. 53.

3 Kerr v. Hill, 27 W. Va. 576; Bernal v. Hovious, 17 Cal. 541. 79 Am. Dec. 147; Evans v. Roberts, 8 Dowl. & R. 611; 5 Barn. & C. 829; Carrington v. Roots, 2 Mees. &



W. 248. But see contra, *Davis v. McFarlane*, 37 Cal. 634, 99 Am. Dec. 340; *Vulicevich v. Skinner*, 77 Cal. 240; and see *O'Brien v. Ballou*, 116 Cal. 321.

4 *Byassee v. Reese*, 4 Met. (Ky.) 372, 83 Am. Dec. 481; and see *Green v. Armstrong*, 1 Denio, 550; *Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173; *McGregor v. Brown*, 10 N. Y. 114.

5 *Purner v. Piercy*, 46 Md. 212, 17 Am. Rep. 591, and note 595. An agreement for the sale of growing pears was held to be an agreement for the sale of an interest in land: *Rodwell v. Phillips*, 9 Mees. & W. 501; and see *Emmerson v. Heelis*, 2 Taunt. 38.

6 *Frank v. Harrington*, 36 Barb. 415; and see, also, *Vulicevich v. Skinner*, 77 Cal. 240; *Kimball v. Sattlay*, 55 Vt. 291, 45 Am. Rep. 614; *Cook v. Steel*, 42 Tex. 57; *Smook v. Smook*, 37 Mo. App. 64.

7 *Webster v. Zielly*, 52 Barb. 482.

8 *Webber v. Lee*, L. R. 9 Q. B. Div. 315.

9 *Lear v. Chauteau*, 23 Ill. 39.

10 *Lothrop v. Foster*, 51 Me. 367; *Finch v. Finch*, 10 Ohio St. 501. Compare *Lenfers v. Honke*, 73 Ill. 405, 24 Am. Rep. 263; *Brown v. Brown*, 47 Mo. 130, 4 Am. Rep. 320.

11 *Clute v. Carr*, 20 Wis. 531, 91 Am. Dec. 442; *Mumford v. Whitney*, 15 Wend. 30.

12 *Howard v. Easton*, 7 Johns. 205.

13 *Copper etc. Co. v. Spencer*, 25 Cal. 18. But compare *Gore v. McBrayer*, 18 Cal. 582. A devise of rents from the testator's real estate, which the executors were directed to sell, is an interest in lands within the statute: *Brown v. Brown*, 23 N. J. Eq. 650.

14 *Powell v. Jessop*, 18 Com. B. 336; *Watson v. Spratley*, 10 Ex. 222.

15 *Warfield v. Dorsey*, 39 Md. 299, 17 Am. Rep. 562; *Watson v. Violett*, 2 Duval, 332. Compare *Evans v. Ashley*, 8 Mo. 177; *Christie v. Simpson*, 1 Rich. 407.

16 *Cassell v. Collins*, 23 Ala. 676. See, also, *Thouvenin v. Lea*, 26 Tex. 612.

17 *Brown v. Morris*, 83 N. C. 251.

18 *Norton v. Gale*, 95 Ill. 533, 35 Am. Rep. 173.

19 *Halbut v. Forest City*, 34 Ark. 246.

20 *Brown v. Rawlings*, 72 Ind. 505.

21 *Holmes v. McCray*, 51 Ind. 358, 19 Am. Rep. 735; and see *Gibbons v. Bell*, 45 Tex. 417; *Trowbridge v. Wetherbee*, 11 Allen, 361; sec. 377, ante.

22 *Rudisill v. Cross*, 54 Ark. 519, 26 Am. St. Rep. 57; and see *Knox v. Tucker*, 48 Me. 373, 77 Am. Dec. 233.

23 *Holmes v. Holmes*, 86 N. C. 205.

24 *Moritz v. Lavelle*, 77 Cal. 11, 11 Am. St. Rep. 230; and see, to same effect, *Raymond v. Johnson*, 17 Wash. 237; *Hirbour v. Reeding*, 3 Mont. 21; *Book v. Mining Co.*, 58 Fed. Rep. 119.

25 *Melton v. Lombard*, 51 Cal. 258.

26 *Moore v. Hamerstag*, 109 Cal. 122.

27 *Babcock v. Read*, 18 Jones & S. 126.

### § 380. Part Performance.

It has long been the settled doctrine in equity that a parol contract for the conveyance of lands will, if partly executed by the party seeking relief, be specifically enforced.<sup>1</sup> This equitable doctrine rests on the idea that to plead the statute in the particular instance would work a fraud.<sup>2</sup> And in order to take a case out of the operation of the statute on the ground that it is partly performed, there must be such a part performance of it on the part of the plaintiff as would render it a fraud on him if the defendant refused to comply with the contract on his part.<sup>3</sup> The conditions under which courts of equity interfere to avoid the statute, upon the ground of part performance, are thus briefly stated: 1. The parol agreement relied on must be certain and definite in its terms; 2. The acts proved in part perform-

ance must refer to, result from, or be made in pursuance of the agreement proved; 3. The agreement must have been so far executed that a refusal of full execution would operate a fraud upon the party, and place him in a situation which does not lie in compensation.<sup>4</sup> The part performance sufficient to take an agreement out of the statute must be something done with the actual or constructive assent of the party sought to be bound;<sup>5</sup> as, for instance, the taking of possession, or the vendee's entry, with the vendor's consent, and the making of valuable improvements;<sup>6</sup> or the payment of the purchase money and being let into possession by the vendor.<sup>7</sup> But the vendee, by committing trespass, and taking forcible possession of lands claimed to be sold, against the consent of the owner, cannot evade the provisions of the statute.<sup>8</sup> So the vendee must have exclusive possession, taken in pursuance of the contract;<sup>9</sup> such a possession as would make him a trespasser in the absence of the contract.<sup>10</sup> Part payment of the purchase money is not of itself usually regarded as a sufficient part performance to take the contract out of the statute;<sup>11</sup> but if full payment has been made, equity demands that execution should be decreed.<sup>12</sup> The doctrine of part performance does not prevail in courts of law.<sup>13</sup> At law, a parol contract for the sale of land is void, notwithstanding possession and improvements by the purchaser.<sup>14</sup> Marriage is not of it-

self a part performance of a verbal agreement to convey real property, in consideration of the marriage, sufficient to take the case out of the statute of frauds.<sup>15</sup> But where a married woman contracts to reconvey certain property to her husband upon his request, in consideration of his conveyance of the same to her through a trustee, the statute of frauds does not apply, and such contract need not be in writing.<sup>16</sup>

1 *Wetmore v. White*, 2 *Caines Cas.* 87, 2 *Am. Dec.* 323; *Newton v. Swazey*, 8 *N. H.* 9; *Campbell v. Campbell*, 11 *N. J. Eq.* 268; *Annan v. Merritt*, 13 *Conn.* 479; *Daniels v. Lewis*, 16 *Wis.* 140; *Williston v. Williston*, 41 *Barb.* 635; *Hanlon v. Wilson*, 10 *Neb.* 138; *Lester v. Kinne*, 37 *Conn.* 14; *Clinan v. Cooke*, 1 *Schoales & L.* 22.

2 *Bond v. Hopkins*, 1 *Schoales & L.* 433; *Brown v. Brown*, 33 *N. J. Eq.* 660; *Harrow v. Johnson*, 3 *Met. (Ky.)* 578; *Malins v. Brown*, 4 *N. Y.* 403; *Postlewait v. Frease*, 31 *Pa. St.* 472.

3 *Burnett v. Blackmar*, 43 *Ga.* 569.

4 By *Christian, J.*, in *Wright v. Puchett*, 22 *Gratt.* 374; and see *Brown v. Brown*, 33 *N. J. Eq.* 660; *Phillips v. Thompson*, 1 *Johns. Ch.* 131; *Greenlee v. Greenlee*, 22 *Pa. St.* 225; *Feusier v. Sneath*, 3 *Nev.* 120; *McCormick v. Grogan*, *L. R.* 4 *H. L.* 82.

5 *Camden etc. R. R. Co. v. Stewart*, 18 *N. J. Eq.* 489.

6 *Hodges v. Green*, 28 *Vt.* 358; *Byrd v. Odem*, 9 *Ala.* 755; *Bowser v. Cravener*, 56 *Pa. St.* 132; *Baldwin v. Thompson*, 15 *Iowa*, 504; *Conway v. Sherron*, 2 *Cranch*, 80; *Moreland v. Lemasters*, 4 *Blackf.* 385; *Vanduzer v. Christian*, 30 *Ga.* 336; *Detrick v. Sharrar*, 95 *Pa. St.* 521; *Mudgett v. Clay*, 5 *Wash.* 103; *Pledger v. Garrison*, 42 *Ark.* 246; *Moulton v. Harris*, 94 *Cal.* 420; *Ford v. Steele*, 31 *Neb.* 521; *Munk v. Weidner*, 9 *Tex. Civ. App.* 491; *Calanchini v. Branstetter*, 84 *Cal.* 249; *Welch v. Whelpley*, 62 *Mich.* 15, 4 *Am. St. Rep.* 810; *Pitt v. Moore*, 99 *N. C.* 85, 6 *Am. St. Rep.* 489.

7 *Kellums v. Richardson*, 21 Ark. 137; *Scott v. Newson*, 27 Ga. 125; *Smith v. Smith*, 1 Rich. Eq. 130; *Fitzsimmons v. Allen*, 39 Ill. 440; *Casler v. Thompson*, 4 N. J. Eq. 59; *Pike v. Morey*, 32 Vt. 37; *Woods v. Fumare*, 10 Watts, 195; *Peay v. Seigler*, 48 S. C. 496, 59 Am. St. Rep. 731.

8 *Camden etc. R. R. Co. v. Stewart*, 18 N. J. Eq. 489; and see *Blackeny v. Ferguson*, 8 Ark. 272; *Price v. Hart*, 29 Mo. 171; *Smith v. Underdunck*, 1 Sand. 579; *Eaton v. Whitaker*, 18 Conn. 222, 44 Am. Dec. 586.

9 *Greenlee v. Greenlee*, 22 Pa. St. 225; *Wible v. Wible*, 1 Grant Cas. 406; and see *Cutler v. Babcock*, 81 Wis. 195, 29 Am. St. Rep. 882; *Emmel v. Hayes*, 102 Mo. 186, 22 Am. St. Rep. 769.

10 *Smith v. Smith*, 1 Rich. Eq. 130.

11 *Sites v. Keller*, 6 Ohio St. 483; *Hart v. McClellan*, 41 Ala. 251; *Meredith v. Naish*, 3 Stew. 207, 20 Am. Dec. 74; *Fanin v. McMullen*, 2 Abb. Pr., N. S., 224; *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 418; *Jackson v. Courtwright*, 5 Munf. 308. But see *Barickman v. Kuykendall*, 6 Blackf. 21; *Townsend v. Houston*, 1 Harr. (Del.) 532, 27 Am. Dec. 732.

12 *Fanin v. McMullen*, 2 Abb. Pr., N. S., 224; and see *Lingle v. Clemens*, 17 Ind. 124.

13 *Brandeis v. Neustadtt*, 13 Wis. 142; *Barickman v. Kuykendall*, 6 Blackf. 21; *Adams v. Townsend*, 1 Met. 485; *Brown v. Pollard*, 89 Va. 696; *Railroad Co. v. McAlpine*, 129 U. S. 305. Formerly, in Massachusetts, the doctrine of part performance was not recognized, the court having no power to enforce in equity the specific performance of any but written contracts: See *Jacobs v. Peterborough etc. R. R. Co.*, 8 Cush. 225. So in Maine: *Bubier v. Bubier*, 24 Me. 42; *Patterson v. Yeaton*, 47 Me. 308. But the supreme judicial court in those states now has general equity powers and authority to decree specific performance of oral contracts: *Somerby v. Buntin*, 118 Mass. 279, 19 Am. Rep. 459; *Pulsifer v. Waterman*, 73 Me. 233. See, also, *Lynes v. Hayden*, 119 Mass. 482. In some of the states the doctrine is still unrecognized, as, for instance, in North Carolina: *Barnes v. Brown*, 71 N. C. 507; Mississippi: *Hairston v. Jaudon*, 42 Miss. 380; *Washington v. Soria*, 73 Miss. 665, 55 Am. St. Rep. 555; and Tennessee: *Ridley v. McNairy*, 2 Humph. 174.

14 *Barickman v. Kuykendall*, 6 Blackf. 21; *Sailors v. Gambriel*, 1 Cart. 88; *Thomas v. Dickenson*, 14 Barb. 90; *Norton v. Preston*, 15 Me. 14, 32 Am. Dec. 128; *O'Herlihy v. Hedges*, 1 Schoales & L. 123.

15 *Peek v. Peek*, 77 Cal. 106, 11 Am. St. Rep. 244; *Welch v. Whelpley*, 62 Mich. 15, 4 Am. St. Rep. 810.

16 *Haussman v. Burnham*, 59 Conn. 117, 21 Am. St. Rep. 74.

### § 381. Construction.

A contract for the purchase and sale of land does not require any particular form or terms,<sup>1</sup> and it should be so construed as to give it effect rather than the contrary.<sup>2</sup> The intention of the parties, as ascertained from the whole instrument, must be carried into effect, if this can be done consistently with legal rules and maxims.<sup>3</sup> Thus, the words "I have sold" should be construed "I have agreed and contracted to sell," in an agreement respecting realty, in order to give effect to it as an executory contract, where it could not operate as an executed contract, and where it is apparent from the whole instrument that the parties intended to make a contract in relation to the sale of such realty.<sup>4</sup> A contract may consist of separate writings, connected by a reference of one to the other, in which case they are to be construed together as forming but one entire agreement.<sup>5</sup> And where two parties enter into a mutual agreement, which is evidenced by a writing signed by each and given to the other, the two instruments are to be taken and construed together as one.<sup>6</sup> A bond for the conveyance of

land and a note executed at the same time for the purchase money are taken as one contract.<sup>7</sup> The same reasonable certainty is requisite to the validity of contracts for the sale of land as in the case of other written agreements;<sup>8</sup> and if a party fails to prove the terms of the agreement relied on, equity will not assist him by directing an issue to ascertain the terms.<sup>9</sup> The description of the premises, to which any effect can be given, must be either perfectly certain of itself, or capable of being made so by a reference to something extrinsic in the contract.<sup>10</sup> A description in the contract as so many acres of land owned by the vendor, lying in a town, county, and state named, is a sufficient description.<sup>11</sup> In the absence of fraud or mutual mistake, a vendor is bound by his contract as to the quantity of the land, although the result contravenes his intention.<sup>12</sup> A description of a certain number of acres in a corner will be taken to embrace the given number of acres in the form of a square.<sup>13</sup> A written contract for the conveyance of a "bridge" across a certain stream, "together with the toll-house, stables, and outhouses of every description," and "all the privileges and appurtenances appertaining or in anywise belonging to said bridge," was held to pass the land upon which the bridge rested, and upon which the other buildings were erected;<sup>14</sup> in accordance with the doctrine that everything essential to the beneficial use and en-

joyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing to the grantee.<sup>15</sup> An agreement to sell land, without expressing what interest in it, is construed to mean the whole interest of the vendor.<sup>16</sup> The terms of an agreement for the sale of land must be unambiguous and definitely ascertained, and its defectiveness in this respect cannot be supplied by parol.<sup>17</sup> And, as a general rule, parol evidence is not admissible to explain, vary, or control the terms of such an agreement.<sup>18</sup> Though, as an exception to this rule, such evidence is sometimes admitted for the purpose of resisting specific performance,<sup>19</sup> upon the ground of fraud,<sup>20</sup> mistake, or surprise.<sup>21</sup> And such evidence may be admitted for the purpose of raising an equity, founded on the agreement, by proof of collateral circumstances;<sup>22</sup> in which cases parol evidence is not used to vary, contradict, or control the written contract of the parties, but to apply its terms to the subject matter.<sup>23</sup> As, for instance, to show the position of land and its condition, the mode of its use and occupation, that it had acquired a local designation or name, and whether it was parcel of a particular estate.<sup>24</sup> For these and similar purposes, it is always competent, and often necessary, to go into parol evidence.<sup>25</sup> A description of land by name in a contract of sale may be sufficient, if the boundaries



are known and well defined.<sup>26</sup> Where a contract for the sale of lands is valid by the laws of the state where such lands are situated, it will be enforced in another state, even though prohibited by the statute of frauds there in force.<sup>27</sup>

1 *Bailey v. Ogden*, 3 Johns. 399, 3 Am. Dec. 509; *Ives v. Hazard*, 4 R. I. 29; *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671. See sec. 378, ante.

2 *Atwood v. Cobb*, 16 Pick. 227, 26 Am. Dec. 657; and see *Auburn City Bank v. Leonard*, 40 Barb. 119.

3 *Watson v. Blaine*, 12 Serg. & R. 131, 14 Am. Dec. 669; *Phillips v. Swank*, 120 Pa. St. 76, 6 Am. St. Rep. 691; *Glenn v. Rossler*, 156 N. Y. 161.

4 *Atwood v. Cobb*, 16 Pick. 227, 26 Am. Dec. 657. See, also, *Jackson v. Clark*, 3 Johns. 424; *Jackson v. Myers*, 3 Johns. 383, 3 Am. Dec. 504.

5 *Morgan v. Holford*, 17 Jur. 225; 17 Eng. L. & Eq. 174; *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Beman v. Green*, 1 Duer, 382; *Jackson v. McKenny*, 3 Wend. 233, 20 Am. Dec. 690; *Clap v. Draper*, 4 Mass. 266, 3 Am. Dec. 215; *Porter v. Sullivan*, 7 Gray, 446; *Hills v. Miller*, 3 Paige, 254, 24 Am. Dec. 218; *Rexford v. Marquis*, 7 Lans. 261; *Isham v. Morgan*, 9 Conn. 374, 23 Am. Dec. 361; *Spangler v. Springer*, 22 Pa. St. 454.

6 *Hunt v. Frost*, 4 Cush. 54.

7 *Black v. Bowman*, 9 Ark. 501; *Duncan v. Charles*, 4 Scam. 561.

8 *Abeel v. Radcliff*, 13 Johns. 297, 7 Am. Dec. 377; *Taylor v. Ashley*, 15 Tex. 50; *Minturn v. Baylis*, 33 Cal. 129; *Agord v. Valencia*, 39 Cal. 292; *Stanton v. Miller*, 58 N. Y. 192; *Hamilton v. McEldowney*, 46 Pa. St. 334; *Miller v. Campbell*, 52 Ind. 125; *Lynes v. Hayden*, 119 Mass. 482; *Shelton v. Church*, 10 Mo. 774; *Minneapolis etc. Ry. Co. v. Cox*, 76 Iowa, 306, 14 Am. St. Rep. 216; *Cox v. Middleton*, 2 Drew. 209.

9 *Savage v. Carroll*, 2 Ball & B. 444; and see *Rose v. Cunyghame*, 11 Ves. 555, note; *Bowman v. Cunningham*, 78 Ill. 48; *Tiernan v. Gibney*, 24 Wis. 190; *Blanchard v. McDougal*, 6 Wis. 167, 70 Am. Dec. 458; *Gelston v. Sigmond*, 27 Md. 334.

10 *Lawson v. Mead*, Hill & D. Supp. 158; 1 How. App. Cas. 394; *Ferris v. Irving*, 28 Cal. 645; *Marriner v. Denison*, 78 Cal. 208; *Karns v. Olney*, 80 Cal. 90, 13 Am. St. Rep. 101; *White v. Herrmann*, 51 Ill. 243, 99 Am. Dec. 543; *Lewis v. Reichey*, 27 N. J. Eq. 240; *Robeson v. Hornbaker*, 3 N. J. Eq. 60; *Hodges v. Horsfall*, 1 Russ. & M. 116.

11 *Richards v. Edick*, 17 Barb. 260; and see *Bemis v. Becker*, 1 Kan. 226. But where land was described by section, but not by township and range, it was held to be too uncertain: *Johnson v. Craig*, 21 Ark. 533; and so, where the description was "a piece of land," with no reference to any other writing for a fuller description: *Whelan v. Sullivan*, 102 Mass. 204. Compare *Owen v. Thomas*, 3 Mylne & K. 353; *Nichols v. Johnson*, 10 Conn. 192. Construction of words "more or less," in contract of sale: See *Frenche v. Chancellor etc.*, 51 N. J. Eq. 624, 40 Am. St. Rep. 548.

12 *Heyer v. Lee*, 40 Mich. 353, 29 Am. Rep. 537; and see *Dart v. Barbour*, 32 Mich. 267. A contract for the sale of land is construed strictly as against the vendor: See *Adams v. Warner*, 23 Vt. 395; *Falley v. Giles*, 29 Ind. 114; *Seaton v. Mapp*, 2 Colles, 556; sec. 304, ante.

13 *Bybee v. Hageman*, 66 Ill. 519; and see *Martin v. Boon*, 2 Ohio, 237.

14 *Sparks v. Hess*, 15 Cal. 186.

15 *Whitney v. Olney*, 3 Mason, 280; *Wise v. Wheeler*, 6 Ired. 196; *Sheet v. Seldon*, 2 Wall. 188; *Wood v. Truckee etc. Co.*, 24 Cal. 487; and see sec. 306, ante.

16 *Bower v. Cooper*, 2 Hare, 408.

17 *Church of Advent v. Farrow*, 7 Rich. Eq. 378.

18 *Tobey v. Leonard*, 2 Cliff. 40; *Cocke v. Bailey*, 42 Miss. 81; *Bartlett v. Pickersgill*, 1 Cox, 15; *Croome v. Lediard*, 2 Mylne & K. 251; *Lewis v. Day*, 53 Iowa, 575; *La Forge v. Rickert*, 5 Wend. 187, 21 Am. Dec. 209; *Haven v. Brown*, 7 Me. 421, 22 Am. Dec. 208; *Dale v. Smith*, 1 Del. Ch. 1, 12 Am. Dec. 64; *Stevens v. Cooper*, 1 Jones Ch. 425, 7 Am. Dec. 499; *Wildbahn v. Robidoux*, 11 Mo. 659; *Davies v. Tilton*, 2 Dru. & War. 232; *Ryan v. Hall*, 13 Met. 520; *Tatman v. Barrett*, 3 Houst. 226.

19 See *Higginson v. Clowes*, 15 Ves. 515.

20 *Winch v. Winchester*, 1 Ves. & B. 375; and see

Dale v. Smith, 1 Del. Ch. 1, 12 Am. Dec. 64; Wharton v. Douglass, 76 Pa. St. 273; Murray v. Duke, 46 Cal. 644.

21 Stevens v. Cooper, 1 Jones Ch. 425, 7 Am. Dec. 499; Dale v. Smith, 1 Del. Ch. 1, 12 Am. Dec. 64; Townshend v. Stangroom, 6 Ves. 328; Wry v. Cutler, 12 Heisk. 28.

22 Davis v. Symonds, 1 Cox, 402.

23 Gerrish v. Towne, 3 Gray, 82, 87; Mead v. Parker, 115 Mass. 413, 15 Am. Rep. 110; Alger v. Kennedy, 49 Vt. 109, 24 Am. Rep. 117; Reed v. Ellis, 68 Ill. 206; and see Stoops v. Smith, 100 Mass. 63, 1 Am. Rep. 85; Sweat v. Shumway, 102 Mass. 365, 3 Am. Rep. 471.

24 Gerrish v. Towne, 3 Gray, 82, 88; and see Moreland v. Brady, 8 Or. 303, 34 Am. Rep. 581; Crawford v. Morris, 5 Gratt. 90; Shiels v. Stark, 14 Ga. 429; Murly v. McDermott, 8 Ad. & E. 138; Smith v. Jersey, 2 Brod. & B. 553. See sec. 379, ante.

25 Gerrish v. Towne, 3 Gray, 87; Sargent v. Adams 3 Gray, 78; and see Hannah v. Shirley, 7 Or. 115; Terry v. Berry, 13 Nev. 514; Ellis v. Burden, 1 Ala. 458; Vanderkarr v. Thompson, 19 Mich. 82; Marsh v. Bellew, 45 Wis. 36; Thayer v. Torrey, 37 N. J. L. 339; Fusting v. Sullivan, 41 Md. 162. When a written contract for the sale of land is silent as to the mode in which payment is to be made, parol testimony is admissible to show how and in what payment was to be made, that being an independent collateral fact: Paul v. Owings, 32 Md. 402. A collateral undertaking may always be proved by parol: Lamphire v. Slaughter, 61 How. Pr. 36. It is held competent to show by parol that a heater and gas fixtures were to pass to the purchaser of a house, under a written agreement in which no mention was made of such articles: Heysham v. Dettre, 89 Pa. St. 506.

26 Burnett v. Kullak, 76 Cal. 535.

27 Miller v. Wilson, 146 Ill. 523, 37 Am. St. Rep. 186.

## § 382. Time of Performance.

The time fixed by the parties for the performance of a contract for the sale of land is, at law, deemed to be of the essence of the contract, or a vital provision thereof.<sup>1</sup> If no time for perform-

ance is specified, a reasonable time must be allowed.<sup>2</sup> Time, though originally of the essence of the contract, may become immaterial by the subsequent conduct of the parties, and especially where they have acquiesced in extending it.<sup>3</sup> In equity, time is not ordinarily regarded as of the essence of a contract for the sale of land;<sup>4</sup> unless it appears from the terms of the contract or the conduct of the parties that it was the design of the parties to render it essential.<sup>5</sup> As a general rule, if a party has not been guilty of gross neglect, if his delay can be reasonably explained and be consistent with good faith, and time has not been made material by the contract of the parties, a court of equity will afford relief.<sup>6</sup> Each case is said, however, to depend upon its own circumstances;<sup>7</sup> but in no case will a court of equity relieve a party against his own neglect or default in performing his contract if such relief will seriously injure the other party.<sup>8</sup> Although time be made the essence of the contract, it may be waived;<sup>9</sup> as where the time is allowed to pass, and the parties go on negotiating for completion of the purchase, this is a waiver, and time is no longer of the essence of the contract.<sup>10</sup> In a contract for the purchase of lands, to be performed within so many months, calendar and not lunar months are to be understood;<sup>11</sup> though the word "month" may mean lunar or calendar month according to the intention of the parties.<sup>12</sup>

1 *Stevenson v. Maxwell*, 2 N. Y. 408; *Conway v. Case*, 22 Ill. 127; *Morris v. School Dist.*, 12 Me. 293, 28 Am. Dec. 182; *Hill v. Fisher*, 34 Me. 143; *Burlington v. Boesler*, 15 Iowa, 555; *Tiernan v. Roland*, 15 Pa. St. 429; *Marshall v. Powell*, 9 Q. B. 779; *Falls v. Carpenter*, 1 Dev. & B. Eq. 277; *Cleary v. Folger*, 84 Cal. 316, 18 Am. St. Rep. 187; *Roberts v. Berry*, 3 De Gex, M. & G. 289; *Tilley v. Thomas*, L. R. 3 Ch. App. 69.

2 *Wiswall v. McGown*, 2 Barb. 270; *McMurray v. Spicer*, L. R. 5 Eq. 527, 543; *Pickering v. Pickering*, 38 N. H. 400; *Meason v. Kaine*, 67 Pa. St. 126; *Benson v. Tilton*, 24 How. Pr. 494; *Ditto v. Harding*, 73 Ill. 117.

3 *Schroeppel v. Hopper*, 40 Barb. 425; and see *Hull v. Sturdivant*, 46 Me. 34; *Stow v. Russell*, 36 Ill. 19; *Shafer v. Niver*, 9 Mich. 253; *Voltz v. Grummett*, 49 Mich. 453. A parol agreement to alter or enlarge the time for completing a contract for the sale of land is void: *Doar v. Gibbes*, 1 Bail. Eq. 371; *Avery v. Kellogg*, 11 Conn. 575; *Stowell v. Robinson*, 3 Bing. N. C. 928; but the courts distinguish between a contract to alter or enlarge the time and a mere voluntary forbearance to insist upon a performance at the time originally agreed upon: *Ogle v. Vane*, L. R. 2 Q. B. 275; affirmed, L. R. 3 Q. B. 272. The distinction is the same as that between a mere license and a contract: *Ogle v. Vane*, L. R. 2 Q. B. 275.

4 *Radcliffe v. Warrington*, 12 Ves. 376; *Lennon v. Napper*, 2 Schoales & L. 683; *Richmond v. Robinson*, 12 Mich. 193; *Jones v. Robbins*, 29 Me. 351, 50 Am. Dec. 593; *Bashier v. Gratz*, 6 Wheat. 528; *Barnard v. Lee*, 97 Mass. 92; *Chadwell v. Winston*, 3 Tenn. Ch. 110.

5 *Huffman v. Hummer*, 17 N. J. Eq. 263; *Jones v. Dobbins*, 29 Me. 351, 50 Am. Dec. 593; *Walton v. Wilson*, 30 Miss. 576; *Pennock v. Ela*, 41 N. H. 189; *Missouri River etc. R. R. Co. v. Brickley*, 21 Kan. 275; *Knott v. Stevens*, 5 Or. 235; *Chabot v. Winter Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192.

6 *Williston v. Williston*, 41 Barb. 635; and see *Tilley v. Thomas*, L. R. 3 Ch. App. 67; *Roberts v. Berry*, 3 De Gex, M. & G. 284; *Coleman v. Applegarth*, 68 Md. 21, 6 Am. St. Rep. 417.

7 *Wells v. Wells*, 3 Ired. 596; *Ruckman v. King*, 19 N. J. Eq. 300; *Jones v. Robbins*, 29 Me. 351, 50 Am. Dec. 593.

8 *Ruckman v. King*, 19 N. J. Eq. 300; and see *Tilley v. Thomas*, L. R. 3 Ch. App. 67; *Brashier v. Gratz*, 6 Wheat. 528; *McCay v. Carrington*, 1 McLean, 50; *Potter v. Tuttle*, 22 Conn. 512; *Merritt v. Brown*, 19 N. J. Eq. 286; *Edwards v. Atkinson*, 14 Tex. 373.

9 *Moody v. Griffin*, 60 Ga. 459; *Dennis v. M'Cogg*, 32 Ill. 429; *Carpenter v. Blandford*, 8 Barn. & C. 575; *Linscott v. Buck*, 33 Me. 530; *Kent v. Church of St. Michael*, 136 N. Y. 10, 32 Am. St. Rep. 693.

10 *Webb v. Hughes*, L. R. 10 Eq. 286; *Falls v. Carpenter*, 1 Dev. & B. Eq. 277; *Wolf v. Willitts*, 35 Ill. 89.

11 *Shapley v. Garey*, 6 Serg. & R. 539; *Hipwell v. Knight*, 1 Younge & C. 419; and see *Lang v. Gale*, 1 Maule & S. 111.

12 *Hipwell v. Knight*, 1 Younge & C. 419.

### § 383. Title.

In the absence of countervailing stipulation or evidence, an agreement to sell land implies, on the part of the vendor, an agreement to convey a good and unencumbered title.<sup>1</sup> The right of the purchaser to have such a title does not grow out of the agreement between the parties, but is given by law, and he may insist upon it, not because it is stipulated for in the agreement, but on the general right of a purchaser to require it.<sup>2</sup> If the vendor contracts to make "a good and sufficient deed," or "a good warranty deed," or "a deed free of all encumbrances," etc., for a stipulated price, he is bound to convey a good title;<sup>3</sup> unless it appears from the contract itself, or from the circumstances accompanying it, that the parties have in view merely such a conveyance as will pass the title which the vendor has, whether de-

fective or not.<sup>4</sup> Such implied warranty of title exists so long as the contract remains executory;<sup>5</sup> but upon the execution of the contract by a deed or conveyance, the law throws upon the purchaser the responsibility of caring for his own protection by suitable express covenants.<sup>6</sup> An agreement to convey land, generally, means a conveyance in fee, unless it appears that the parties intended to contract on the basis of a lesser estate.<sup>7</sup> A party will not be compelled to pay his money and take a doubtful title, or an encumbered property, unless he has bargained for such.<sup>8</sup> And a title is held to be doubtful when it is such as other persons may fairly question, although the court may entertain a favorable opinion of it.<sup>9</sup> And a doubtful title cannot be made marketable by an opinion of a court on a case stated between vendor and vendee.<sup>10</sup> Every title is doubtful which invites or exposes the party holding it to litigation.<sup>11</sup> But a purchaser will not be permitted to reject a title on account of a bare possibility of its proving to be imperfect.<sup>12</sup> Mere suspicion upon opinions in the abstract, etc., will not support an objection by a purchaser.<sup>13</sup> And in an action against the purchaser, the vendor need not show title, but the burden of proof is on the defendant to show that he has none.<sup>14</sup> A covenant to convey the title means the legal estate in fee, free from all valid claims, liens, or encumbrances;<sup>15</sup> and, as a general rule, the purchaser

must have the legal estate, and is not to be compelled to take an equitable estate.<sup>16</sup> A contract to make a good title means a title good both at law and in equity, and a court of law will adjudge a title to be either good or bad, having no middle term for it.<sup>17</sup> A vendee will not be compelled to accept a title founded on a decree against an infant, for the reason that the latter may show cause against it when of age.<sup>18</sup> An agreement to sell land, and to execute and deliver a warranty deed thereof, is not complied with by a deed from the husband only, but the wife must join;<sup>19</sup> a party purchasing a title clear of encumbrances is not bound to accept one subject to a right of dower.<sup>20</sup> Title under a deed not seasonably recorded is bad;<sup>21</sup> so of a title by foreclosure where the owner was not a party to the suit.<sup>22</sup> Nor will a purchaser be compelled to take a title depending upon the words of a will which are too doubtful ever to be settled without litigation;<sup>23</sup> nor to accept a title made out by presumption from length of possession.<sup>24</sup> A marketable title is one which is free from encumbrance, and which is of a character to assure to the vendee the quiet and peaceable enjoyment of the property.<sup>25</sup> Perfect title must be one that is good and valid beyond all reasonable doubt.<sup>26</sup>

1 *Shreek v. Pierce*, 3 Iowa, 350; *Watts v. Waddle*, 1 McLean, 200; *Holland v. Holmes*, 14 Fla. 390; *Delavan v. Duncan*, 49 N. Y. 485; *Flinn v. Barber*, 64 Ala. 193; *Anonymous*, 2 Abb. N. C. 56; *Woodruff v. Thorne*, 49 Ill.



88; *Clute v. Robinson*, 2 Johns. 611; *Penfield v. Clark*, 62 Barb. 584; *Hedderly v. Johnson*, 42 Minn. 443, 18 Am. St. Rep. 521; *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123; *White v. Foljambe*, 11 Ves. 337; *Souter v. Drake*, 5 Barn. & Adol. 902. It is, however, held in Massachusetts that under an agreement to sell land, a covenant to convey a good title does not necessarily entitle the covenantee to a warranty deed: *Kyle v. Kavanagh*, 103 Mass. 356, 4 Am. Rep. 560; and see, to same effect, *Tinney v. Ashley*, 15 Pick. 564; *Gazely v. Price*, 16 Johns. 267; *Joslyn v. Taylor*, 33 Vt. 470; *Brown v. Covillaud*, 6 Cal. 566; *Green v. Covillaud*, 10 Cal. 322, 70 Am. Dec. 725. Compare *Winter v. Stock*, 29 Cal. 407, 89 Am. Dec. 57.

2 *Prothro v. Smith*, 6 Rich. Eq. 324; *Lounsberry v. Locamher*, 25 N. J. Eq. 554; *White v. Foljambe*, 11 Ves. 337; *Cullum v. Bank of Alabama*, 4 Ala. 21, 37 Am. Dec. 725; *Moore v. Williams*, 115 N. Y. 586, 12 Am. St. Rep. 844; *Vought v. Williams*, 120 N. Y. 253, 17 Am. St. Rep. 634.

3 *Owings v. Baldwin*, 8 Gill, 337; *Brown v. Gannon*, 14 Me. 276; *Abendroth v. Greenwich*, 29 Conn. 356; *Jones v. Huff*, 36 Tex. 678; *Holland v. Holmes*, 14 Fla. 390; *Cannon River Mfg. Assn. v. Rogers*, 42 Minn. 123, 18 Am. St. Rep. 497; *Wilson v. Getty*, 57 Pa. St. 266.

4 *Lockett v. Williamson*, 31 Mo. 55; 37 Mo. 388; *Porter v. Noyes*, 2 Me. 22, 11 Am. Dec. 30, and note 34; *Cogan v. Cook*, 22 Minn. 137; *Den v. Tindall*, 20 N. J. L. 214; *Bateman v. Johnson*, 10 Wis. 1; *Davis v. Henderson*, 17 Wis. 105; *Refeld v. Woodfolk*, 22 How. 327; *Hoback v. Kilgores*, 26 Gratt. 442, 21 Am. Rep. 317; *Deacons v. Doyle*, 1 Matt. (Va.) 258.

5 *Cullum v. Bank of Alabama*, 4 Ala. 21, 37 Am. Dec. 725.

6 *Cullum v. Bank of Alabama*, 4 Ala. 21, 37 Am. Dec. 725; *Walsh v. Hall*, 66 N. C. 233.

7 *Goddin v. Vaughn*, 14 Gratt. 102; *Witter v. Biscoe*, 13 Ark. 422; *Vardeman v. Lawson*, 17 Tex. 10; *Tremaine v. Lining*, Wright, 644.

8 *Chambers v. Tulane*, 9 N. J. Eq. 146; *Regney v. Coles*, 6 Bosw. 479; *Stapylton v. Scott*, 16 Ves. 272; *Mitchell v. Steinmetz*, 97 Pa. St. 254; and see *Gregory v. Christian*, 42 Minn. 304, 18 Am. St. Rep. 507, and note.

9 *Pyrke v. Waddingham*, 10 Hare, 1; 17 Eng. L. & Eq. 534. Compare *Sohier v. Williams*, 1 Curt. 479.

10 *Pratt v. Eby*, 67 Pa. St. 396.

11 *Speakman v. Forepaugh*, 44 Pa. St. 363.

12 *Lawrens v. Lucas*, 6 Rich. Eq. 217; *Dalzell v. Crawford*, 1 Pars. Cas. 37; *Emery v. Grocock*, 6 Madd. 54; and see *Wilsey v. Dennis*, 44 Barb. 354; *Crawford v. Murphy*, 22 Pa. St. 84.

13 *M'Queen v. Farquhar*, 11 Ves. 467.

14 *Breithaupt v. Thurmond*, 3 Rich. 216. *Prima facie* he who enters upon land under a contract to purchase admits the title of the vendor to be good, and if he fails to comply with the terms of the contract, he, or anyone holding under him, cannot, in an action by the vendor to regain possession of the land, put the vendor to proof of his title: *Pyles v. Reeve*, 4 Rich. 555.

15 *Jones v. Gardner*, 10 Johns. 266; *Kelly v. Bradford*, 3 Bibb, 317.

16 *Abel v. Heathcote*, 2 Ves. 100; *Littlefield v. Tinsley*, 26 Tex. 353; *Smith v. Robertson*, 23 Ala. 312.

17 *Maberley v. Robins*, 5 Taunt. 625; 1 Marsh. 258; *Cullum v. Bank of Alabama*, 4 Ala. 21, 37 Am. Dec. 725.

18 *Bryan v. Reed*, 1 Dev. & B. Eq. 86; and see *Bullock v. Bullock*, 1 Jacob & W. 603.

19 *Pomeroy v. Drury*, 14 Barb. 418; *Watts v. Waddle*, 1 McLean, 200.

20 *Lewis v. Coxe*, 5 Harr. (Del.) 401; *Runnels v. Weber*, 59 Me. 488; *Bigelow v. Hubbard*, 97 Mass. 195; *Harrington v. Murphy*, 109 Mass. 299; *Heimbürg v. Ismay*, 3 Jones & S. 35. But see *Bostwick v. Williams*, 36 Ill. 65; *Powell v. Monson etc. Co.*, 3 Mason, 355.

21 *Collins v. Delashmutt*, 6 Or. 51; *Speakman v. Forepaugh*, 44 Pa. St. 463.

22 *Joughans v. M'Cormick*, 18 Cal. 660.

23 *Sharp v. Adcock*, 4 Russ. 374; *Collard v. Sampson*, 17 Jur. 569, 641; 21 Eng. L. & Eq. 352; *Jervoise v. Northumberland*, 1 Jacob & W. 569.

24 *Tevis v. Richardson*, 7 T. B. Mon. 654. Sixty years' possession is an unobjectionable title to a fee simple: *Barnwall v. Harris*, 1 Taunt. 430. And a purchaser may be compelled to take a title depending upon parol evidence

of adverse possession under the statute of limitations: 3 & 4 Wm. IX, c. 27; *Scott v. Nixon*, 3 Dru. & War. 388. A vendee, although he intends to purchase lands for the purpose of annoying tenants adjoining, is not bound to accept an imperfect title if he has stipulated for a good one: *Hollenbaugh v. Morrison*, 9 Watts, 408.

25 *Barnard v. Brown*, 112 Mich. 452, 67 Am. St. Rep. 432; and see *Herman v. Somers*, 158 Pa. St. 424, 38 Am. St. Rep. 851, and note.

26 *Turner v. McDonald*, 76 Cal. 177, 9 Am. St. Rep. 189.

### § 384. Defect in Title—Relief.

Although a valid title is implied in a contract for the sale of land,<sup>1</sup> yet one who buys a defective title, knowing it to be so, must abide the consequences.<sup>2</sup> A party selling land by a “chancing bargain” is not responsible for the title.<sup>3</sup> Where the vendor undertakes to point out to the purchaser the boundaries of the land, or the place where it lies, or its improvements, he does so at his peril.<sup>4</sup> But if the purchaser can obtain substantially what he bargained for, and the deficiency is of a nature justly to be made a subject of compensation, a specific performance will be decreed.<sup>5</sup> As a general rule, the vendee shall have what the vendor can give, with an abatement out of the unpaid purchase money for so much as the quantity fell short of the representation.<sup>6</sup> If title to part of a tract of land fails, the purchaser may claim performance as to the residue, with an abatement from the purchase money for the deficiency.<sup>7</sup> When land is sold as containing so many acres “more or less,” if the quantity, on

an actual survey and estimation, either overrunning or falling short of the contents named be small, no compensation should be recovered by either party;<sup>8</sup> but if the variance is considerable, the party sustaining the loss should be allowed for it.<sup>9</sup> A vendee who holds his vendor's bond for title, and who remains in undisturbed possession, cannot resist the payment of the purchase money on account of a defect in the title without showing that the vendor is insolvent or unable to respond in damages.<sup>10</sup> And the fact that title to land has been questioned or even assailed in court does not, in the absence of a judgment or execution thereon, constitute a good defense to an action for the purchase money.<sup>11</sup> So a vendee who has paid part of the purchase money, and given a mortgage for the residue, will not be relieved against the security given on the mere ground of a defect of title, where there is no allegation of fraud in the sale, and he has not been evicted;<sup>12</sup> he will be remitted to his remedy at law upon the covenants in his deed.<sup>13</sup> If a vendee accepts a contract in which the ownership of the vendor is assumed, and agrees to pay for the land without requiring the vendor to produce evidence of his title, the burden will be upon him to show defects.<sup>14</sup> He is presumed to have satisfied himself as to the title when he made his bargain.<sup>15</sup> Where the memorandum of sale specifies no time within which the examination of the title

is to be made, a reasonable time is implied.<sup>16</sup> If a contract for the sale of land provides that the title is to be examined and accepted or rejected by the purchaser's attorney, the action of such attorney in rejecting the title is final, and the purchaser cannot be compelled to accept it on the ground that it is perfect and marketable.<sup>17</sup> Title to land by adverse possession is as effectual for the purposes of remedy or defense founded upon it as that created in any other manner.<sup>18</sup> A purchaser need not accept title if there are contingent remaindermen whose interests have not been acquired nor barred.<sup>19</sup>

1 See *Winne v. Reynolds*, 6 Paige, 407; sec. 382, ante.

2 *Beck v. Simmons*, 7 Ala. 71; *Williamson v. Raney*, 1 Freem. (Miss.) 112; *Jameson v. Rixey*, 94 Va. 342, 64 Am. St. Rep. 726. In the absence of any fraud or warranty, the purchaser cannot resist the payment of the purchase money on account of defects in the title which were known to him: *Strong v. Waddell*, 56 Ala. 471; and see *Mayo v. Purcell*, 3 Munf. 243.

3 *Nelson v. Forgey*, 4 J. J. Marsh. 569.

4 *Cowger v. Gordon*, 4 Blackf. 110; *Hampton v. Eubank*, 4 J. J. Marsh. 634; *Eubank v. Hampton*, 1 Dana, 343; and see *Ragan v. Gwinn*, 19 La. Ann. 133. Where a specified tract of land is sold for a sum in gross, the boundaries of the tract control the description of the quantity it contains, and neither party can have a remedy against the other for an excess or deficiency in the quantity, unless such excess or deficiency is so great as to furnish evidence of fraud or misrepresentation: *Voorhees v. De Meyer*, 2 Barb. 48; and see *Chipman v. Briggs*, 5 Cal. 76; *Gillilan v. Hinkle*, 8 W. Va. 262.

5 *Guyenet v. Mantel*, 4 Duer, 86; *King v. Bardeau*, 6 Johns. Ch. 38, 10 Am. Dec. 312; *Winne v. Reynolds*, 6 Paige, 407; *Guest v. Homfray*, 5 Ves. 818.

6 Kent v. Carcaud, 17 Md. 291; Mendenhall v. Steckell, 47 Md. 453, 28 Am. Rep. 481; Morss v. Elmendorf, 11 Paige, 277; Hawk v. Pollard, 6 Blackf. 108; and see Westervelt v. Matheson, 1 Hoff. Ch. 37; Smith v. Pettus, 1 Stew. & P. 107.

7 King v. Wilson, 6 Beav. 124; Voorhees v. De Mayer, 2 Barb. 37; Tomlinson v. Savage, 6 Ired. Eq. 430; Hill v. Buckley, 17 Ves. 394; Butcher v. Peterson, 26 W. Va. 447, 53 Am. Rep. 89; People v. Stephens, 71 N. Y. 555. The purchaser has an election to proceed with the purchase pro tanto, or to abandon it altogether: *Id.*

8 Darling v. Osborne, 51 Vt. 157; Couse v. Boyles, 4 N. J. Eq. 216; Winch v. Winchester, 1 Ves. & B. 375; Pedan v. Owen, Rice Eq. 55; Ketchum v. Stout, 20 Ohio, 453; Tyson v. Hardesty, 29 Md. 305; Stephens v. Hudson, 54 Ga. 513.

9 Darling v. Osborne, 51 Vt. 157. On a contract to convey "about sixty-five acres," the vendee is not bound to accept thirty or thirty-six acres: Baltimore etc. Land Soc. v. Smith, 54 Md. 187, 39 Am. Rep. 374. The introduction of the words "more or less," following the enumeration of the number of acres, is no obstacle to relief in equity upon the ground of mistake: Belknap v. Sealey, 14 N. Y. 143, 67 Am. Dec. 120; Paine v. Upton, 87 N. Y. 327, 41 Am. Rep. 371. See Josselyn v. Edwards, 57 Ind. 212.

10 Wyatt v. Garlington, 56 Ala. 576; and see Blanks v. Walker, 54 Ala. 117.

11 Deetz v. Mock, 47 Iowa, 451; and see Miller v. Argylls, 5 Leigh, 460.

12 Ryerson v. Willis, 81 N. Y. 280; and see Decker v. Schulze, 11 Wash. 47, 48 Am. St. Rep. 838.

13 Bumpus v. Platner, 1 Johns. Ch. 218; Abbott v. Allen, 2 Johns. Ch. 519, 7 Am. Dec. 554. If a vendee knows the condition of a title he is buying, and takes a deed with covenants, he can only rely upon his covenants for protection: Gartman v. Jones, 24 Miss. 234; and see Leird v. Abernathy, 10 Heisk. 626; Worley v. Nethercott, 91 Cal. 512, 25 Am. St. Rep. 209, and note.

14 Tuxbury v. French, 41 Mich. 13.

15 Dwight v. Cutler, 3 Mich. 566, 64 Am. Dec. 105; Allen v. Atkinson, 21 Mich. 361; and see Easton v.

Montgomery, 90 Cal. 307, 25 Am. St. Rep. 123; *Anderson v. Blood*, 152 N. Y. 285, 57 Am. St. Rep. 515.

16 *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123.

17 *Allen v. Pockwitz*, 103 Cal. 85, 42 Am. St. Rep. 99; but compare *Montgomery v. Land Bureau*, 94 Cal. 284, 28 Am. St. Rep. 122; *Vought v. Williams*, 120 N. Y. 253, 17 Am. St. Rep. 634.

18 *Barnes v. Light*, 116 N. Y. 34; *Greene v. Couse*, 127 N. Y. 386, 24 Am. St. Rep. 458, and note; *Barnard v. Brown*, 112 Mich. 452, 67 Am. St. Rep. 432. See, also, sec. 252, ante.

19 *Wilson v. White*, 109 N. Y. 59, 4 Am. St. Rep. 420; and see *Monarque v. Monarque*, 80 N. Y. 325; *Young v. Young*, 97 N. C. 132.

### § 385. Tender of Deed.

In general, if there is a contract for the sale of land, and the agreement of the parties is concurrent and to be executed at the same time, the vendor cannot maintain an action for the price nor for damages for the nonperformance of the contract, without showing that he had tendered a title deed, or that the purchaser had waived the tender, or otherwise made it nugatory by his act or conduct.<sup>1</sup> The preparation of the deed is considered a part of the vendor's undertaking, unless the terms of the contract furnish an inference to the contrary.<sup>2</sup> It is, however, held in New York that it is not necessary for a vendor, under a covenant to convey, to make out and tender a deed on the day the purchase is to be completed.<sup>3</sup> He is not bound to prepare it until the vendee is ready to demand it, and even then he

is allowed a reasonable time to draw and execute it.<sup>4</sup> So in Alabama it is the duty of the purchaser to prepare a deed and tender it to the vendor to be executed, and it is the duty of the vendor, when required, to furnish to the purchaser an abstract of the title.<sup>5</sup> So, by custom in Pennsylvania, the purchaser should tender for execution the necessary papers, and especially where the time of payment is optional with him.<sup>6</sup> At common law, unless there is an express agreement to the contrary, the cost of the conveyance falls upon the vendee.<sup>7</sup> If several lots are sold, the vendor is bound, if required, to give separate deeds, and his offer to execute one deed does not render the contract entire.<sup>8</sup> A vendor of land in his own right is bound to convey it with general warranty, unless it be otherwise agreed between the parties.<sup>9</sup> Under a contract that does not specify what sort of a deed the purchaser is entitled to, he may demand a deed with customary covenants.<sup>10</sup> What is customary is to be determined by the *lex rei sitae*.<sup>11</sup> Failure on the part of the vendor to tender a conveyance when the purchase price became due, or according to the terms of the contract of sale, does not show that there has been a mutual abandonment and rescission of the contract.<sup>12</sup> In Alabama, the vendee, having performed his part of the contract, need not tender the vendor a deed for his signature thereto, when the latter has denied the



vendee's right to a conveyance under the contract.<sup>13</sup>

1 *Dubignon v. Land*, 5 Rich. 251; *Melton v. Coffelt*, 59 Ind. 310; *Overly v. Tipton*, 68 Ind. 414; *Pershing v. Canfield*, 70 Mo. 140; *Arledge v. Rooks*, 22 Ark. 427; *Seeley v. Howard*, 13 Wis. 336; *Winton v. Sherman*, 20 Iowa, 295; and see *Reddish v. Smith*, 10 Wash. 178, 45 Am. St. Rep. 781; *Naftzger v. Gregg*, 99 Cal. 83, 37 Am. St. Rep. 23, and note; *Bailey v. Lay*, 18 Colo. 418; *Telfener v. Russ*, 162 U. S. 180.

2 *Christian v. Nixon*, 11 Ired. 3; *Headley v. Shaw*, 39 Ill. 354; *Winton v. Sherman*, 20 Iowa, 295; *Gregory v. Christian*, 42 Minn. 304, 18 Am. St. Rep. 507; *Tinney v. Ashley*, 15 Pick. 546, 26 Am. Dec. 620; and see *Cooper v. Brown*, 2 McLean, 495; *Smith v. Haynes*, 9 Me. 128. If no place is fixed for the delivery of the deed, the vendor is bound to seek the vendee and tender the deed: *Franchat v. Leach*, 5 Cow. 506.

3 *Wells v. Smith*, 2 Edw. Ch. 78; 7 Paige, 22, 31 Am. Dec. 274.

4 *Wells v. Smith*, 2 Edw. Ch. 78; 7 Paige, 22, 31 Am. Dec. 274; and see *Fuller v. Williams*, 7 Cow. 53, 17 Am. Dec. 498; *Newcomb v. Brackett*, 16 Mass. 161.

5 *Wade v. Killough*, 5 Stew. & P. 450; *Chapman v. Lee*, 55 Ala. 623.

6 *Tiernan v. Roland*, 15 Pa. St. 429.

7 *Winter v. Jones*, 10 Ga. 190, 54 Am. Dec. 379; *Stephens v. Medina*, 3 Gale & D. 110; *Poole v. Hill*, 6 Mees. & W. 835.

8 *Van Eps v. Schenectady*, 12 Johns. 436, 7 Am. Dec. 330.

9 *Hoback v. Kilgores*, 26 Gratt. 442, 21 Am. Rep. 317; *Goddin v. Vaughn*, 14 Gratt. 102; *Vardeman v. Lawson*, 17 Tex. 10; *Clark v. Lyons*, 25 Ill. 105; *Clark v. Redman*, 1 Blackf. 380; *Penfield v. Clark*, 62 Barb. 584; *Dejavan v. Duncan*, 49 N. Y. 485. A contract to convey to the purchaser a "clear title" entitles the purchaser to a conveyance of the land with general warranty, and free of encumbrance: *Kenny v. Hoffman*, 31 Gratt. 442.

10 *Dwight v. Cutler*, 3 Mich. 566, 64 Am. Dec. 105; *Allen v. Hazen*, 26 Mich. 146.

11 Gault v. Van Zile, 37 Mich. 22.

12 Bradford v. Parkhurst, 96 Cal. 102, 31 Am. St. Rep. 189; Newton v. Hull, 90 Cal. 487; overruling on this point, Cleary v. Folger, 84 Cal. 316, 18 Am. St. Rep. 187.

13 Davis v. Robert, 89 Ala. 402, 18 Am. St. Rep. 126.

### § 386. At What Time Title Passes.

As a general rule, the acceptance by a purchaser of a deed for land is to be deemed prima facie full execution of an agreement to convey.<sup>1</sup> Thenceforth the agreement becomes void, and the rights of the parties are to be determined by the deed, and not by the agreement.<sup>2</sup> But this rule is subject to some exceptions, as when there are collateral covenants,<sup>3</sup> or when the stipulation is to do a series of acts at successive periods, or to perform, simultaneously, two or more distinct and separable acts.<sup>4</sup> In the latter case, the executory contract becomes extinct only as to such of its parts as are covered by the conveyance.<sup>5</sup> And when the defendant agreed to convey a piece of land, and also to convey, or cause to be conveyed, the interest of A B in another piece, it was held that a deed conveying only one parcel was but in part fulfillment, the contract contemplating two conveyances.<sup>6</sup> Upon an agreement to sell land, it is competent for the parties to stipulate that the title shall pass at the time, or that it shall be withheld until some future day, or until the performance of a further condition;<sup>7</sup> and if, upon a survey of the entire instrument, the latter intention appears, it must prevail.<sup>8</sup>

1 Long v. Hartwell, 34 N. J. L. 116; and see Frazer v. Robinson, 42 Miss. 121.

2 Carter v. Beck, 40 Ala. 599; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 273; Jones v. Wood, 16 Pa. St. 25; Long v. Hartwell, 34 N. J. L. 116; Carr v. Roach, 2 Duer, 20; Crotzer v. Russell, 9 Serg. & R. 78.

3 See Long v. Hartwell, 34 N. J. L. 116. The covenant, in order to be deemed collateral and independent, so as not to be destroyed by the execution of the deed, must not look to or be connected with the title, possession, quantity, or emblements of the land which is the subject of the contract. If it does so, the execution of the deed, in pursuance of the contract, will operate as an extinguishment of it: Bull v. Willard, 9 Barb. 641; and see Carter v. Beck, 40 Ala. 599.

4 Witbeck v. Waive, 16 N. Y. 532; Long v. Hartwell, 34 N. J. L. 116; and see Murdock v. Gilchrist, 52 N. Y. 247; Davis v. Lottich, 46 N. Y. 393.

5 Long v. Hartwell, 34 N. J. L. 124.

6 Brown v. Moorhead, 8 Serg. & R. 569.

7 Jackson v. Moncrief, 5 Wend. 26; Carnes v. Apperson, 2 Sneed, 562.

8 Topp v. White, 12 Heisk. 173, 174.

### § 387. Rescission of Contract.

Failure of title, either in whole or in part, is a sufficient ground for decreeing the rescission of a contract for the sale of land.<sup>1</sup> But the offer to rescind on the part of the vendee should be made as soon as he discovers the defect.<sup>2</sup> So the parties are to be placed in statu quo upon a rescission;<sup>3</sup> though if this rule cannot be literally complied with, a substantial compliance may be sufficient.<sup>4</sup> And a party entitled to rescind, because of failure of title as to part, waives that right by accepting a conveyance of the residue without objection.<sup>5</sup> Nor will a rescission be al-

lowed because of defect of title, where it is apparent at the hearing that a perfect title may be made, and no fraud is alleged or proved.<sup>6</sup> And if a party seeking to rescind has been negligent, and guilty of unreasonable delay, and especially if there has been a change of circumstances in any material particulars, a rescission will not be decreed.<sup>7</sup> The general rule is, that a contract for the purchase of land will not be rescinded upon stale objections to the title after long and undisturbed possession.<sup>8</sup> If a vendee fails to comply with the terms of the contract under which he obtained possession, the vendor is at liberty to treat the contract as rescinded, and to regain possession by ejectment.<sup>9</sup> On the other hand, if a vendor brings ejectment to recover lands which are in the possession of the vendee, under a parol contract of sale, it amounts to a rescission of the contract, and the vendee can recover the purchase money paid.<sup>10</sup> The surrender of a written contract of sale, followed by acts inconsistent with its continuance, such as negotiating a sale to another party by the surrenderer for the benefit of the surrenderee, operates, in equity, as a rescission of such contract.<sup>11</sup> The fact that a purchaser left the state before fulfilling his contract to purchase was held to be no abandonment of the contract.<sup>12</sup> If a purchaser of land has given a note or mortgage in part payment of the purchase price and wishes to rescind, his proper remedy is in equity.<sup>13</sup>

1 Owens v. Rector, 44 Mo. 389; Sanders v. Lansing, 70 Cal. 429; Burks v. Davies, 85 Cal. 110, 20 Am. St. Rep. 213; Johnson v. Siesfiell, 6 Baxt. 41; Lang v. Brown, 4 Ala. 622; Martin v. Atkinson, 7 Ga. 228, 50 Am. Dec. 403; Chastian v. Stanley, 23 Ga. 26; York v. Gregg, 9 Tex. 85; Judson v. Wass, 11 Johns. 525, 6 Am. Dec. 302. Adverse possession is alone a sufficient ground for rescission: Williams v. Carter, 3 Dana, 198.

2 Newell v. Turner, 9 Port. 420; Lacey v. McMillen, 9 B. Mon. 523; Garrett v. Lynch, 45 Ala. 204. See Holt's Appeal, 98 Pa. St. 257.

3 Staley v. Murphy, 47 Ill. 241; Latham v. Hickey, 21 La. Ann. 425; Percival v. Hichborn, 56 Me. 575; Schroepel v. Hopper, 40 Barb. 425; Harris v. Catlin, 37 Tex. 581; Masson v. Swan, 6 Heisk. 450; Martin v. Chambers, 84 Ill. 579; Swayne v. Waldo, 73 Iowa, 749, 5 Am. St. Rep. 712; Westhafer v. Patterson, 16 Am. St. Rep. 330; Thompson v. Peck, 115 Ind. 512; Smith v. Brittenham, 98 Ill. 188.

4 Williams v. Carter, 3 Dana, 198; and see Goodrich v. Lathrop, 94 Cal. 56, 28 Am. St. Rep. 91.

5 Harrison v. Deramus, 33 Ala. 463; and see Gale v. Nixon, 6 Cow. 446; Barnett v. Gaines, 8 Ala. 373; Cummins v. Boyle, 1 J. J. Marsh. 480; Perkins v. Williams, 5 Cold. 512.

6 Westall v. Austin, 5 Ired. Eq. 1; Fletcher v. Wilson, 1 Smedes & M. Ch. 376; Wickliffe v. Lee, 6 B. Mon. 543. A rescission will not be decreed for an innocent misrepresentation of the state of the title, if at the hearing the title is perfected so as to be as represented: Buford v. Guthrie, 14 Bush, 690; Davidson v. Moss, 5 How. (Miss.) 683.

7 Taylor v. Fleet, 1 Barb. 471; Jones v. Smith, 33 Miss. 215; McKeen v. Beaupland, 35 Pa. St. 488; Hammond v. Wallace, 85 Cal. 522, 20 Am. St. Rep. 239.

8 Edwards v. Morris, 1 Ohio, 524; and see McNaughton v. Patridge, 11 Ohio, 223, 38 Am. Dec. 731; Wright v. Vanderplank, 8 De Gex, M. & G. 133; Jarratt v. Aldam, L. R. 9 Eq. 463; Nealon v. Henry, 131 Mass. 153; Rackemann v. Improvement Co., 167 Mass. 1, 57 Am. St. Rep. 427.

9 Burnett v. Caldwell, 9 Wall. 290; Jackson v. Walker, 7 Cow. 637; Tibbs v. Morris, 44 Barb. 138.

10 *Hairston v. Jaudon*, 42 Miss. 380.

11 *Crane v. Decamp*, 21 N. J. Eq. 414.

12 *Creamer v. Ogden*, 16 Ind. 176. What amounts to an abandonment of a contract is held to be a question of law and not of fact: *Dula v. Cowles*, 7 Jones, 290, 95 Am. Dec. 463.

13 *Rackemann v. Improvement Co.*, 167 Mass. 1, 57 Am. St. Rep. 427; and so, to same effect, *Loaiza v. Superior Ct.* etc., 85 Cal. 11, 20 Am. St. Rep. 197.

### § 387a. Same—Continued.

Either party has the right to withdraw from pending negotiations for the sale of land, where no consideration has passed, no rights intervened, and the conditions of the parties have not changed.<sup>1</sup> But a contract to convey land cannot be avoided on the ground that it does not embody the agreement of the parties, and was signed in ignorance of such variation from the agreement.<sup>2</sup> The party signing a contract without having read it, or taken precautions to ascertain its contents, is bound thereby.<sup>3</sup> And it is familiar law that a party will not be permitted to rescind a contract for the purchase of realty so as to reclaim what he has parted with, and at the same time hold on to what he has received in the transaction.<sup>4</sup> The right of the vendor to rescind does not exist until the vendee is in default in payment of the purchase money;<sup>5</sup> and if he has received part of the purchase money from the vendee, who has taken possession under the contract, he cannot rescind without notice to the ven-

dee of his intention to do so;<sup>6</sup> and if he has received payments from the vendee after default in failing to pay the purchase money notes at maturity, he thereby waives his right of rescission.<sup>7</sup> If an agreement for the sale of land is conditioned to be void in case the vendee shall fail to fulfill, and he does so fail, the vendor may treat it as void or as in force.<sup>8</sup> Generally, a party who is in default will not be allowed to rescind a contract, and when he has contracted for the purchase of land, and fails to make his payments as stipulated in the contract, he is not entitled to rescind.<sup>9</sup>

1 Wardell v. Williams, 62 Mich. 50, 4 Am. St. Rep. 814; Honeyman v. Marryat, 21 Beav. 14; Chinnock v. Marchioness of Ely, 4 De Gex, J. & S. 647.

2 Minneapolis etc. Ry. Co. v. Cox, 76 Iowa, 306, 14 Am. St. Rep. 216.

3 McKinney v. Herrick, 66 Iowa, 414; McCormack v. Molburg, 43 Iowa, 561.

4 Thompson v. Peck, 115 Ind. 512; Westhafer v. Patterson, 120 Ind. 459, 16 Am. St. Rep. 330, and note.

5 Huffman v. Mulkey, 78 Tex. 556, 22 Am. St. Rep. 71.

6 Phillips v. Herndon, 78 Tex. 378, 22 Am. St. Rep. 59.

7 Phillips v. Herndon, 78 Tex. 378, 22 Am. St. Rep. 59; Kennedy v. Embry, 72 Tex. 390; Moore v. Giesecke, 76 Tex. 548.

8 Wilcoxson v. Stitt, 65 Cal. 596, 52 Am. Rep. 310.

9 Reddish v. Smith, 10 Wash. 178, 45 Am. St. Rep. 781.

**§ 388. Mistake.**

The courts will grant relief against mistakes of fact, and on that ground will set aside contracts for the sale and purchase of land.<sup>1</sup> But, generally speaking, if there is a mistake of law, and no proof of any fraud or imposition, a party must abide the consequences of his ignorance, and cannot on that account be permitted to avoid his contract;<sup>2</sup> and a mistake of law happens when a party having full knowledge of the facts comes to an erroneous conclusion as to their legal effect.<sup>3</sup> There are, however, exceptions to the general rule,<sup>4</sup> and especially, if the mistake is a mixed one of law and fact, relief will be granted when justice and equity require it.<sup>5</sup> And it is held that a contract entered into under a mutual misconception of legal rights, amounting to a mistake of law in the contracting parties, by which the object of it cannot be accomplished, is as liable to be set aside or rescinded as a contract founded in mistake of matters of fact.<sup>6</sup> Where there was a mutual mistake of parties as to the interest of the vendor in the land sold, it was held that the sale should be set aside.<sup>7</sup> An administrator sold lands of his intestate to B, both supposing the fee was conveyed, whereas only an equity of redemption was passed, and it was held that the purchaser was entitled to relief in equity.<sup>8</sup> And more especially when the mutual mistake is attributable to the agent of the party seeking to



take advantage of it will equity grant relief.<sup>9</sup> But in a recent case, the plaintiff, proposing to buy the defendant's interest in certain lands, was informed of all the facts affecting the title. An attorney acting for both parties, upon consideration of those facts, advised the parties that the defendant had a certain interest in the lands, and the plaintiff, acting upon that advice, purchased the supposed interest; this advice being incorrect, it was held that the mistake was one of law only, and that the plaintiff was not entitled to recover the purchase money.<sup>10</sup> So where an executor purchased lands belonging to his testator's estate at a public sale made by himself and his coexecutors, under a mistake of law as to the power of sale conferred on them by the will, relief from his purchase was denied.<sup>11</sup> As it respects mistakes of fact, equity relieves against them as well as frauds, in a deed or contract in writing,<sup>12</sup> and this, either where the plaintiff seeks relief affirmatively, on the ground of mistake, or where the defendant sets it up as a defense, or to rebut an equity.<sup>13</sup> If it appears that both parties to a contract were mistaken as to the situation of the land, and other circumstances materially affecting its value, the contract will be rescinded.<sup>14</sup> But equity will not relieve a vendee on the ground of a mutual mistake as to the boundaries, unless the mistake be fully and clearly proved.<sup>15</sup> When a misrepresentation is made as to quantity, though

innocently, the purchaser is entitled to have what the vendor can give, with an abatement out of the purchase money for so much as the quantity falls short of the representation;<sup>16</sup> and this right of the purchaser exists as well after the execution of the deed as before, where the mistake was not known when the deed was executed.<sup>17</sup> Where by mutual mistake two hundred and six acres were conveyed as "about two hundred and twenty-two acres, be the same more or less," the price being fixed at so much an acre, and a mortgage given for part, the grantee was held entitled to a corresponding abatement therefrom.<sup>18</sup> So on a contract to convey "about sixty-five acres," the vendee is not bound to accept thirty or thirty-six acres.<sup>19</sup> A sale of land by metes and bounds, and of estimated quantity for a given sum, imports a sale in gross, and a much larger deficit in quantity would be required to evidence mistake than where the sale was by the acre.<sup>20</sup> On a sale of land by the acre, relief is to be granted for all deficiencies not reasonably imputable to the variation of instruments and small errors in surveys, whether the purchaser has expressly retained an election to have the tract surveyed or not.<sup>21</sup> Where a vendee is entitled to rescind because of a mistake of fact, the vendor will be granted such equitable relief in the nature of compensation, in addition to the return of the land, as the nature of the case may require.<sup>22</sup>

1 Hough v. Richardson, 3 Story, 659; Hurd v. Hall, 12 Wis. 112; Champlin v. Laytin, 18 Wend. 407, 31 Am. Dec. 382; Spurr v. Benedict, 99 Mass. 463; Tuthill v. Babcock, 2 Wood. & M. 299; Bridger v. Rice, 1 Jacob & W. 74; Jennings v. Broughton, 5 De Gex, M. & G. 126; Honeyman v. Marryatt, 6 H. L. Cas. 111; Baptiste v. Peters, 51 Ala. 158; Goodrich v. Lathrop, 94 Cal. 56, 28 Am. St. Rep. 91.

2 Marshall v. Collett, 1 Younge & C. 232; Burkhauser v. Schmitt, 45 Wis. 316, 30 Am. Rep. 740; Cooper v. Phibbs, L. R. 2 Eng. & Ir. App. 170; McAninch v. Laughlin, 13 Pa. St. 371; McDaniel v. Grace, 15 Ark. 465.

3 Dixon, C. J., in Hurd v. Hall, 12 Wis. 124; and see Lapp v. Lapp, 43 Mich. 287; Gerdine v. Menage, 41 Minn. 417; Renard v. Clink, 91 Mich. 1, 30 Am. St. Rep. 458.

4 See Bank of United States v. Daniel, 12 Pet. 32; Hunt v. Rousmanier, 8 Wheat. 174; Tyson v. Tyson, 31 Md. 134.

5 King v. Doolittle, 1 Head, 77; Gross v. Leber, 47 Pa. St. 520; Griffith v. Townley, 69 Mo. 13, 33 Am. Rep. 476. Compare Haden v. Weare, 15 Ala. 149.

6 Champlin v. Laytin, 1 Edw. Ch. 471; and see Brown v. Lamphear, 35 Vt. 252; Willan v. Willan, 16 Ves. 82; Cooper v. Phibbs, 2 H. L. Cas. 149.

7 Irick v. Fulton, 3 Gratt. 193. And see Barfield v. Price, 40 Cal. 555; Irwin v. Wilson, 45 Ohio St. 437.

8 Griffith v. Townley, 69 Mo. 13, 33 Am. Rep. 476.

9 Green v. Morris etc. R. R. Co., 12 N. J. Eq. 165; Longhurst v. Star Ins. Co., 19 Iowa, 364; Woodbury etc. Bank v. Charter Oak Ins. Co., 31 Conn. 517; Rogers v. Atkinson, 1 Ga. 12.

10 Burkhauser v. Schmitt, 45 Wis. 316, 30 Am. Rep. 740.

11 Dill v. Shahan, 25 Ala. 694, 60 Am. Dec. 540.

12 Rosevelt v. Fulton, 2 Cow. 129; Goodell v. Field, 15 Vt. 576; Rogers v. Atkinson, 1 Ga. 12; Baptiste v. Peters, 51 Ala. 158.

13 Rogers v. Atkinson, 1 Ga. 12; and see Griswold v. Smith, 10 Vt. 452; Collier v. Lanier, 1 Ga. 238.

14 Chamberlaine v. Marsh, 6 Munf. 283.

15 *Leas v. Edison*, 9 Gratt. 277. See *Hill v. Bush*, 19 Ark. 522; *Griswold v. Smith*, 10 Vt. 452.

16 *Hill v. Buckley*, 17 Ves. 394; and see sec. 383, ante.

17 *Quesnel v. Woodlief*, 2 Hen. & M. 173, note; *Darling v. Osborne*, 51 Vt. 148; *Paine v. Upton*, 87 N. Y. 327, 41 Am. Rep. 371.

18 *Paine v. Upton*, 87 N. Y. 327, 41 Am. Rep. 371.

19 *Baltimore etc. Land Soc. v. Smith*, 54 Md. 187, 39 Am. Rep. 374; and see *Marbury v. Stonestreet*, 1 Md. 147.

20 *Rich v. Ferguson*, 45 Tex. 396; and see *Joliffe v. Hite*, 1 Call, 262; *Vender v. Fonda*, 3 Paige, 94; *Smith v. Fly*, 24 Tex. 345, 76 Am. Dec. 109; *Buck v. McCoughtry*, 5 T. B. Mon. 216; *Moses v. Wallace*, 7 Lea, 416. The fact that a spring represented to be upon the land purchased, which from its location and value could not have formed a decided inducement to the purchase, is found to be without the limits of the purchase is not sufficient to authorize a rescission of the contract: *Winston v. Gwathmey*, 8 B. Mon. 19.

21 *Nelson v. Carrington*, 4 Munf. 332; and see *Failing v. Osborne*, 3 Or. 498; *Miller v. Bently*, 5 Sneed, 672; *Myers v. Lindsay*, 5 Lea, 334.

22 *Goodrich v. Lathrop*, 94 Cal. 56, 28 Am. St. Rep. 91.

### § 389. Fraud, etc.

It is well settled that a court of equity may rescind a conveyance of land, or a contract therefor, which has been procured by fraud or false representations, when a proper case for the court is presented.<sup>1</sup> But the equity of a bill to rescind a contract on this ground is much weakened by delay in bringing suit.<sup>2</sup> A party who would rescind a contract on the ground of fraud must offer to do so in a reasonable time after the fraud is discovered.<sup>3</sup> Fraudulent representation and con-

concealment by the vendor as to the nature, quality, and quantity of the land will entitle the vendee to a rescission of the contract.<sup>4</sup> And so as to false representations or concealment by the vendor relative to his title.<sup>5</sup> It is held that the misrepresentation which will avoid a contract of sale must have been as to some material fact, it must have misled the purchaser to his injury, and it must have been falsely and fraudulently made.<sup>6</sup> And representations in the sale of land, though false, made in respect to a subject which is mere matter of opinion, as, for instance, the quantity of wood on the land, is held not to constitute ground for the rescission of the contract.<sup>7</sup> On the other hand, it is held that actual misrepresentation of the quantity of lands, though not fraudulently made, if the mistake essentially affects the contract, equity will rescind it.<sup>8</sup> But if the purchaser knows the representation to be false, it cannot be said to influence his conduct, and he has no right to make complaint under the circumstances.<sup>9</sup> And a sale though founded on the false representations of the vendor cannot be for that cause wholly rescinded, if prior to the completion of the sale the vendee had become acquainted with all the facts, and yet confirmed the bargain.<sup>10</sup> A contract for the sale of lands may be avoided for the misrepresentation of the vendee, as well as that of the vendor.<sup>11</sup> Thus, where the vendee applied to the vendor to purchase a

lot of wild land, and represented to him that it was worth nothing except for the purposes of a sheep pasture, when he knew there was a valuable mine on the lot, of which the vendor was ignorant, it was held that this fraud would avoid the purchase.<sup>12</sup> It is always competent to show misrepresentation and fraud by parol evidence.<sup>13</sup>

1 *Woodman v. Freeman*, 25 Me. 531; *Green v. Chandler*, 25 Tex. 148; *Hickey v. Drake*, 47 Mo. 369; *Smith v. Robertson*, 23 Ala. 312; *Cressler v. Rees*, 27 Neb. 515, 20 Am. St. Rep. 691; *Wilson v. Carpenter*, 91 Va. 183, 50 Am. St. Rep. 824; *Stark v. Henderson*, 30 Ala. 438; *Griffin v. Sketoe*, 30 Ga. 300; *Evans v. Bicknell*, 6 Ves. 174, 182. A contract or conveyance will not in general be set aside for fraud, except at the option of the party defrauded: *Jones v. Hill*, 9 Bush, 692; *Ayers v. Hewett*, 19 Me. 281.

2 *Foxworth v. Bullock*, 44 Miss. 457; and see *Krutz v. Craig*, 53 Ind. 561; *Baker v. Read*, 18 Beav. 398; *Longworth v. Hunt*, 11 Ohio St. 194; *Clegg v. Edmondson*, 8 De Gex, M. & G. 807.

3 See *Davis v. Tarwater*, 15 Ark. 286; *Obert v. Obert*, 12 N. J. Eq. 423; *Foster v. Gressett*, 29 Ala. 393; *Walsham v. Stainton*, 1 De Gex, J. & S. 678; *Delano v. Jacoby*, 96 Cal. 275, 31 Am. St. Rep. 201, and note; *Hammond v. Wallace*, 85 Cal. 522, 20 Am. St. Rep. 239; *Ansley v. Bank of Piedmont*, 113 Ala. 467, 59 Am. St. Rep. 122; *Myers v. O'Hanlon*, 12 Rich. 196. And the proof of fraud must be full, clear, and explicit: *Rupart v. Dunn*, 1 Rich. 101.

4 *Thomas v. Beebe*, 25 N. Y. 244; *Smith v. Robertson*, 23 Ala. 312; *Lowry v. McLane*, 3 Grant Cas. 333; *Parret v. Shaubhut*, 5 Minn. 323, 80 Am. Dec. 424; *Martin v. Jordon*, 60 Me. 531; *Mitchell v. Moore*, 24 Iowa, 394; *Boyce v. Grundy*, 3 Pet. 210; *Camp v. Camp*, 2 Ala. 632, 36 Am. Dec. 423; *Underwood v. West*, 43 Ill. 403; *Perkins v. Rice*, 6 Litt. 218, 12 Am. Dec. 298. Compare *Peck v. Bullard*, 2 Humph. 41.

5 *Green v. Chandler*, 25 Tex. 148; *Crutchfield v. Danilly*, 16 Ga. 432; *Prout v. Roberts*, 32 Ala. 427;

Smith v. Robertson, 23 Ala. 312; Kennedy v. Johnson, 2 Bibb, 12, 4 Am. Dec. 666; Gill v. Corbin, 4 J. J. Marsh. 392; Carr v. Callaghan, 3 Litt. 365; Gray v. Bartlett, 20 Pick. 186, 32 Am. Dec. 208. Compare Hastings v. O'Donnell, 40 Cal. 148.

6 Pratt v. Philbrook, 33 Me. 17; Brown v. Blunt, 72 Me. 415; Wilson v. Strayhorn, 26 Ark. 28; and see Grider v. Clopton, 27 Ark. 244; Crown v. Carriger, 66 Ala. 590.

7 Longshore v. Jack, 30 Iowa, 298; Crown v. Carriger, 66 Ala. 590; Curry v. Keyser, 39 Ind. 214; Holbrook v. Connor, 60 Me. 578, 11 Am. Rep. 212; Drake v. Latham, 50 Ill. 270; Mooney v. Miller, 102 Mass. 217; Morrison v. Koch, 32 Wis. 254; Davis v. Betz, 66 Ala. 206. Compare Martin v. Jordon, 60 Me. 531; McKinnon v. Vollmar, 75 Wis. 82, 17 Am. St. Rep. 178.

8 Belknap v. Sealey, 14 N. Y. 143, 67 Am. Dec. 120; and see Rogers v. Mitchell, 42 N. H. 158; Hammond v. Pennock, 5 Lans. 358; Hough v. Richardson, 3 Story, 659; Smith v. Babcock, 2 Wood. & M. 216; Graves v. Lebanon Nat. Bank, 10 Bush, 23, 19 Am. Rep. 50; Bankhead v. Alloway, 6 Cold. 56; Kennedy v. Panama etc. Co., L. R. 2 Q. B. 580; Reynell v. Sprye, 1 De Gex, M. & G. 709.

9 Ely v. Stewart, 2 Md. 408; and see Hough v. Richardson, 3 Story, 659; Clapham v. Shilletts, 7 Beav. 149; Gordon v. Parmelee, 2 Allen, 214; Stitt v. Little, 63 N. Y. 427; Bowman v. Carithers, 40 Ind. 90; Arnold v. Hagerman, 45 N. J. Eq. 186, 14 Am. St. Rep. 712; Sutton v. Morgan, 158 Pa. St. 204, 38 Am. St. Rep. 841, and note.

10 Pratt v. Philbrook, 33 Me. 17. If the vendee, with full knowledge that he has been defrauded, proceeds to execute the contract on his part by payments of portions of the purchase money, it is a waiver of the fraud, and he is not subsequently entitled to a rescission of the contract: Knuckolls v. Lea, 10 Humph. 577; and see Griggs v. Woodruff, 14 Ala. 9; Burr v. Todd, 41 Pa. St. 206; Yeates v. Prior, 6 Ark. 58.

11 Masterton v. Beers, 6 Robt. 368; Warner v. Daniels, 1 Wood. & M. 90; Bull v. Bell, 4 Wis. 54; Pinckard v. Woods, 8 Gratt. 140; Foxworth v. Bullock, 44 Miss. 457; Ellsworth v. Randall, 78 Iowa, 141, 16 Am. St. Rep. 425

12 *Livingston v. Peru Iron Co.*, 2 Paige, 390; and see *Bowman v. Bates*, 2 Bibb, 47, 4 Am. Dec. 677; *Smith v. Beatty*, 2 Ired. Eq. 456, 40 Am. Dec. 435. But compare *Fox v. Macreth*, 2 Brown Ch. 420; *Harris v. Tyson*, 24 Pa. St. 347, 64 Am. Dec. 661. But the fact that the vendee discovered a valuable mine on the land soon after the purchase is no ground for a rescission of the sale, in the absence of proof that he knew the fact before the purchase and suppressed it: *Bean v. Valle*, 2 Mo. 126.

13 *Rogers v. Hadley*, 2 Hurl. & C. 227; *Robinson v. Lord Vernon*, 7 Com. B., N. S., 231; *Chambers v. Livermore*, 15 Mich. 381; *Best v. Stow*, 2 Sand. Ch. 300; *Phyte v. Wardell*, 2 Edw. Ch. 47; and see *Wilson v. Watts*, 9 Md. 356; *Hatson v. Browne*, 9 Com. B., N. S., 442.

### § 389a. Same—Continued.

It is a doctrine well sustained by authority that if a vendor of real estate makes material representations as to the character, quality, or location of his land, and the vendee believes, relies, and acts on such representations, which prove to be false, the vendor cannot shield himself from the consequences of his fraudulent conduct by interposing the plea of laches on the part of his vendee.<sup>1</sup> But if the deceived party, after discovering the falsity of the representations upon the truth of which he claims to have relied, does not promptly avail himself of the right to rescind, he loses the right, and his failure for a considerable length of time to impeach the transaction raises a presumption of his acquiescence in its validity.<sup>2</sup> In a court of law, the purchaser of land cannot resist payment for fraud and misrepresentation



so long as he retains possession.<sup>3</sup> Mere inadequacy of price is held not alone sufficient to warrant a court in setting aside a sale and a conveyance made in pursuance thereof.<sup>4</sup> And the failure to fulfill a mere promise or undertaking, something to be done in the future, will not alone authorize a rescission of a contract upon the ground of fraud. It is the making of such promise, having no intention, at the time, to perform it, that constitutes fraud for which such a contract may be rescinded.<sup>5</sup> So if a purchaser of real property receiving a conveyance with covenants of warranty enters into possession thereof, and neither fraud nor insolvency is imputable to his grantor, a court of equity will not decree a rescission of the contract for failure of title, for the reason that the purchaser is protected by his covenants.<sup>6</sup> A bona fide purchaser for a valuable consideration from a fraudulent grantor is not affected by the fraud of the latter, and may sell and convey a good title to one having notice.<sup>7</sup> The rule of damages for false representations in the sale of land is stated to be the difference between its actual value, and its value if the alleged facts regarding it had been true.<sup>8</sup>

1 Hooch v. Bowman, 42 Neb. 80, 47 Am. St. Rep. 691; and so, to same effect, see Gunther v. Ullrich, 82 Wis. 222, 33 Am. St. Rep. 32; Holst v. Stewart, 161 Mass. 516, 42 Am. St. Rep. 442, and note; Mead v. Bunn, 32 N. Y. 275; Simar v. Canaday, 53 N. Y. 298, 13 Am. Rep. 523; Carmichael v. Vandebur, 50 Iowa, 651; Davis

v. Jenkins, 46 Kan. 19; Backer v. Pyne, 130 Ind. 288, 30 Am. St. Rep. 231.

2 Orendorff v. Tallman, 90 Ala. 441; Lockwood v. Fitts, 90 Ala. 150; Hammond v. Wallace, 85 Cal. 522, 20 Am. St. Rep. 239.

3 Ansley v. Bank of Piedmont, 113 Ala. 467, 59 Am. St. Rep. 122.

4 Shay v. Wheeler, 69 Mich. 254; Hammond v. Wallace, 85 Cal. 522, 20 Am. St. Rep. 239; Weaver v. Nugent, 72 Tex. 272, 13 Am. St. Rep. 793. See sec. 391, post.

5 Birmingham etc. Elevator Co. v. Elyton Land Co., 93 Ala. 553; Nelson v. Improvement Co., 96 Ala. 515, 38 Am. St. Rep. 116; and see Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 9 Am. St. Rep. 727.

6 Meeks v. Garner, 93 Ala. 17; Parker v. Parker, 93 Ala. 80; Fields v. Clayton, 117 Ala. 538, 67 Am. St. Rep. 189, and note. See, also, Munro v. Long, 35 S. C. 354, 28 Am. St. Rep. 851; Decker v. Schulze, 11 Wash. 47, 48 Am. St. Rep. 858.

7 Craig v. Zimmerman, 87 Mo. 475, 56 Am. Rep. 466; Gordon v. Ritenour, 87 Mo. 54.

8 Williams v. McFadden, 23 Fla. 143, 11 Am. St. Rep. 345. See secs. 401, 402, post.

### § 390. Incapacity of Party.

Constructive fraud, consisting in the personal incapacity of one of the parties, may constitute ground for avoiding the contract.<sup>1</sup> Thus, contracts for the purchase and sale of land, entered into by idiots, lunatics, and other persons non compos mentis, may generally be avoided upon the ground of a want of rational and deliberate consent.<sup>2</sup> A contract of this kind made by one adjudged a lunatic is absolutely void.<sup>3</sup> So equity will not lend its aid to enforce a deed or contract obtained from a man when intoxicated;<sup>4</sup> but, on

the other hand, will rescind the contract.<sup>5</sup> And a contract may be avoided by the legal representatives of a party thereto, on the ground of his having been drunk when it was made, though such drunkenness was not occasioned by the procurement of the other party.<sup>6</sup> But in such case, the intoxication must have been so excessive as to deprive the party of the use of his reason and understanding.<sup>7</sup> The fact that the vendee was drunk at the time, and not in a situation to judge correctly or act prudently, will not avail him to avoid the contract, unless he can show that it was procured by the contrivance of the vendor, or that an unfair advantage was taken of his situation.<sup>8</sup> So the mere fact that a person is of weak understanding, if there be no fraud, or no undue advantage be taken, is not of itself sufficient ground for setting aside the contract.<sup>9</sup> Much less will a contract be set aside merely because the party was illiterate, unless he has been grossly deceived or fraudulently imposed upon.<sup>10</sup> Whenever a fiduciary relation exists between the parties, such as the relation of parent and child, guardian and ward, trustee and cestui que trust, etc., whereby trust and confidence are reposed on one side and influence and control are exercised on the other, equity requires that the confidence which has been reposed be not betrayed;<sup>11</sup> and a person availing himself of his position of confidence will not be permitted to retain the advan-

tage although the transaction could not have been impeached if no such confidential relation had existed.<sup>12</sup> Where a person of weak intellect was overreached in an exchange of lands by one in whom he confided, it was held that the contract should be rescinded, and the parties placed in statu quo.<sup>13</sup> So where one induced his nephew, an ignorant young man, to accept land worth little more than a third of the amount due him, and to give a discharge of the debt, it was held that fraud would be presumed, and the conveyance was set aside.<sup>14</sup> The burden of proof rests upon the party who fills the position of active confidence, to show that absolute fairness, adequacy, and equity characterized the transaction.<sup>15</sup>

1 See *Dent v. Bennett*, 5 Mylne & C. 277; *Huguenin v. Basely*, 14 Ves. 273; *Niell v. Morley*, 9 Ves. 478; *Street v. Goss*, 62 Mo. 228; *Conant v. Jackson*, 16 Vt. 335; *Loaiza v. Superior Ct.*, 85 Cal. 11, 20 Am. St. Rep. 197.

2 *Beverley's Case*, 4 Coke, 124; *Hadley v. Latimer*, 3 Yerg. 537; *Davis v. McNally*, 5 Sneed, 583, 73 Am. Dec. 159; *Elliott v. Ince*, 7 De Gex, M. & G. 475; *Jacobs v. Richards*, 18 Beav. 300; *Stikeman v. Dawson*, 1 De Gex & S. 105; *Manning v. Gill*, L. R. 13 Eq. 485; *Garrow v. Brown*, 1 Winst. Eq. 46; *Shaw v. Dixon*, 6 Bush, 644. An infant who, by a false and fraudulent representation that he is of full age, induces a man to enter into a contract with him will be bound in equity: *Hannah v. Hodgson*, 30 Beav. 23; *Ex parte Taylor*, 8 De Gex, M. & G. 254.

3 *Fitzhugh v. Wilcox*, 12 Barb. 235. Compare *Carr v. Holliday*, 5 Ired. Eq. 167; *Noel v. Karper*, 53 Pa. St. 97; *In re Gaugmere*, 14 Pa. St. 417, 53 Am. Dec. 554. Contracts of a lunatic made before office found are not void but voidable, while those made afterward are absolutely void: *Wait v. Maxwell*, 5 Pick. 217, 16

Am. Dec. 391; *Pearl v. McDowell*, 3 J. J. Marsh. 67<sup>8</sup>, 20 Am. Dec. 199; *Jackson v. Gardner*, 9 Cow. 552; *Matter of Beckwith*, 3 Hun, 443.

4 *Conant v. Jackson*, 16 Vt. 335; and see *Gore v. Gibson*, 13 Mees. & W. 623; *Dorr v. Munsell*, 13 Johns. 430; *Prentice v. Achorn*, 2 Paige, 30; *Calloway v. Witherspoon*, 5 Ired. Eq. 128; *Cooke v. Clayworth*, 18 Ves. 12.

5 *Calloway v. Witherspoon*, 5 Ired. Eq. 128. The court will rescind the contract, not on account of his drunkenness, but of the fraud: *Calloway v. Witherspoon*, 5 Ired. Eq. 128; *Cooke v. Clayworth*, 18 Ves. 12; and see *Shaw v. Thackray*, 17 Jur. 1045; 23 Eng. L. & Eq. 18.

6 *Wigglesworth v. Steers*, 1 Hen. & M. 70; *Reinicker v. Smith*, 2 Har. & J. 421.

7 *Dunn v. Amos*, 14 Wis. 106; *Willcox v. Jackson*, 51 Iowa, 208; *Taylor v. Patrick*, 1 Bibb, 168; *Belcher v. Belcher*, 10 Yerg. 121; *Hutchinson v. Brown*, 1 Clarke Ch. 408; and see *Peck v. Cary*, 27 N. Y. 9, 84 Am. Dec. 220; *Burns v. O'Rourke*, 5 Robt. 649; *Neilson v. Laffin*, 50 N. Y. St. Rep. 277; *Wright v. Fisher*, 65 Mich. 275. 8 Am. St. Rep. 886.

8 *Rodman v. Zilley*, 1 N. J. Eq. 320; *Bush v. Breinig*, 113 Pa. St. 310, 57 Am. Rep. 469.

9 *Young v. Stevens*, 48 N. H. 133, 2 Am. Rep. 202; *Mann v. Betterly*, 21 Vt. 326; *Davis v. McNalley*, 5 Sneed, 583, 73 Am. Dec. 159; *Ball v. Mannin*, 3 Bligh, N. S., 1.

10 *Rodman v. Zilley*, 1 N. J. Eq. 320; and see *Cain v. Warford*, 33 Md. 23; *Beverly v. Walden*, 20 Gratt. 147; *Alman v. Stout*, 42 Pa. St. 114.

11 *Lee v. Pearce*, 68 N. C. 76; *Dickinson v. Bradford*, 59 Ala. 581, 31 Am. Rep. 23; *Hoxie v. Price*, 31 Wis. 82; *Kelly v. McGuire*, 15 Ark. 555; *Fisher v. Budlong*, 10 R. I. 525; *Cowee v. Cornell*, 75 N. Y. 91, 31 Am. Rep. 428; *Highberger v. Stiffler*, 21 Md. 338, 83 Am. Dec. 593; *Martin v. Martin*, 35 Ala. 560; *Beam v. Macomber*, 33 Mich. 127; *Darlington's Appeal*, 86 Pa. St. 512, 27 Am. Rep. 726; *Mount v. Tappey*, 7 Bush, 617; *Aaron v. Mendel*, 78 Ky. 427, 430, 39 Am. Rep. 248; *Boyd v. De La Montagnie*, 73 N. Y. 498, 29 Am. Rep. 197; *Smith v. Kay*, 7 H. L. Cas. 750; *Rhodes v. Bate*, L. R. 1 Ch. App. 61; *Ranken v. Patton*, 65 Mo. 378. See *Cleland v. Fish*, 43 Ill. 282.

12 *Tate v. Williamson*, L. R. 2 Ch. App. 61; *White v. Smith*, 51 Ala. 405. See sec. 163, ante.

13 *Bunch v. Shannon*, 46 Miss. 525.

14 *Hall v. Perkins*, 3 Wend. 626.

15 *Hoghton v. Hoghton*, 15 Beav. 288; *Smith v. Kay*, 7 H. L. Cas. 750; *Bradshaw v. Yates*, 67 Mo. 221; *Smith v. Brotherline*, 62 Pa. St. 461. In cases of confidential relations, it is not necessary to show that fraud or imposition was practiced upon him who bestows the confidence, but simply that such relation existed at the time the transaction was entered into. When this is done, the burden of showing the fairness of the transaction rests on him who claims under it: *Street v. Goss*, 62 Mo. 229; *Yosti v. Loughran*, 49 Mo. 594; and see *Waddell v. Lanier*, 62 Ala. 347; *Ferguson v. Lowery*, 54 Ala. 510, 25 Am. Rep. 718. A contract between an administrator and one of his distributees, by which the latter sells the former all his interest in the estate, is presumptively void: *Williams v. Powell*, 66 Ala. 20, 41 Am. Rep. 742. See, also, *Pierce v. Pierce*, 71 N. Y. 154, 27 Am. Rep. 22; *Berkmeyer v. Killerman*, 32 Ohio St. 239, 30 Am. Rep. 577.

### § 391. Inadequacy and Excess of Consideration.

Mere inadequacy of consideration is not, of itself, usually regarded as a distinct and independent ground for avoiding a contract.<sup>1</sup> But it is always a material circumstance to be considered, along with other circumstances existing in a case, conducing to show that it would be inequitable to enforce the contract.<sup>2</sup> And where the inadequacy of consideration is such as to shock the moral sense of mankind, it is in itself evidence of fraud, and affords sufficient ground for canceling the contract.<sup>3</sup> Such inadequacy, in general, raises a conclusive presumption that an undue advantage has been taken of the ignorance, the

weakness, or the necessity and distress of the vendor, and this imposes upon the vendee the necessity of removing this violent presumption by the clearest evidence of the fairness of his conduct.<sup>4</sup> Fraud in the vendee is of the essence of the objection to the contract in such a case.<sup>5</sup> And equity will especially interfere, where a confidential relation exists between the parties and this confidence is abused or the influence naturally growing out of that confidence is exerted to obtain an advantage at the expense of the confiding party.<sup>6</sup> So inadequacy of price alone, when such as to show that the vendor did not understand the contract, or was induced to make it to escape oppression, will avoid the sale.<sup>7</sup> But, generally speaking, in the absence of mistake, fraud, or want of capacity satisfactorily made out, equity will not relieve a person from the consequences of an improvident sale of his land.<sup>8</sup> Thus, a sale of a reversion in real estate, by a young man who had just attained his majority, there being no fraud or imposition on the part of the purchaser, and no confidential relations between the parties, will not be set aside for mere inadequacy of price.<sup>9</sup> In some cases a vendee may obtain redress where he pays or agrees to pay an excessive consideration.<sup>10</sup> But it is said that the excess must be such as would shock all men of common intelligence at first blush, and be itself a proof of fraud or management on the part of the vendor.<sup>11</sup>

1 *Osgood v. Franklin*, 2 Johns. Ch. 1; 14 Johns. 527; *Dunn v. Chambers*, 4 Barb. 376; *Borell v. Dann*, 2 Hare, 440; *Garnett v. Macon*, 2 Brock, 185, 246; *Ready v. Noakes*, 29 N. J. Eq. 497; *Harrison v. Guest*, 8 H. L. Cas. 481; 6 De Gex, M. & G. 434; *Gulf R. R. Co. v. Commissioners etc.*, 12 Kan. 482; *Lee v. Kirby*, 104 Mass. 420; *Slater v. Maxwell*, 6 Wall. 268; *White v. McGannon*, 29 Gratt. 512; *Kidder v. Chamberlin*, 41 Vt. 62; *Lee v. Kirby*, 104 Mass. 420; *Cribbins v. Markwood*, 13 Gratt. 495, 67 Am. Dec. 775. See sec. 389a, ante.

2 *Hale v. Wilkinson*, 21 Gratt. 75; *Beard v. Campbell*, 2 A. K. Marsh. 125, 12 Am. Dec. 362; *Seymour v. Delancey*, 6 Johns. Ch. 222; *Mann v. Betterley*, 21 Vt. 326; *Lester v. Mahan*, 25 Ala. 445, 60 Am. Dec. 530; and see *Booten v. Scheffer*, 21 Gratt. 495; *Chambers v. Livermore*, 15 Mich. 381.

3 *Mayo v. Carrington*, 19 Gratt. 74; *Hale v. Wilkinson*, 21 Gratt. 75; *Saltonstall v. Gordon*, 33 Ala. 149; *Coles v. Trecothick*, 9 Ves. 234, 246; *Lowther v. Lowther*, 13 Ves. 95; *Wintermute v. Snyder*, 3 N. J. Eq. 489. Inadequacy of price which will operate to prevent the specific performance of a contract must be inadequacy at the time of the sale: *Hale v. Wilkinson*, 21 Gratt. 75; *Judge v. Wilkins*, 19 Ala. 765.

4 *Butler v. Haskell*, 4 Desaus. Eq. 651; and see *Lowther v. Lowther*, 13 Ves. 95; *Wormack v. Rogers*, 9 Ga. 60; *Gulf R. R. Co. v. Commissioners etc.*, 12 Kan. 482; *Deane v. Rastron*, 1 Anstr. 64.

5 *Borell v. Dann*, 2 Hare, 440; *Ready v. Noakes*, 29 N. J. Eq. 449.

6 *Tate v. Williamson*, L. R. 1 Eq. 528; affirmed, L. R. 2 Ch. App. 55; *Berkmeyer v. Killerman*, 32 Ohio St. 239, 30 Am. Rep. 577; *Jacox v. Jacox*, 40 Mich. 473, 29 Am. Rep. 547; *Pierce v. Pierce*, 71 N. Y. 154, 27 Am. Rep. 22; *Cook v. Cole*, 6 N. J. Eq. 522.

7 *Cruise v. Christopher*, 5 Dana, 182; *Murray v. Palmer*, 2 Schoales & L. 474; *Pickett v. Loggon*, 14 Ves. 215; and see *Lester v. Mahan*, 25 Ala. 445; *Tate v. Williamson*, L. R. 1 Eq. 528; L. R. 2 Ch. App. 55; *McKinney v. Pinchard*, 2 Leigh, 149, 21 Am. Dec. 601.

8 *Thompson v. Gossitt*, 23 Ark. 175; *Dunn v. Chambers*, 4 Barb. 376; *Parmelee v. Cameron*, 41 N. Y. 392; *Barker v. Anderson*, 35 Ill. 68.



9 *Cribbins v. Markwood*, 13 Gratt. 495, 67 Am. Dec. 775; and see *Thompson v. Gossitt*, 23 Ark. 175; *Harrison v. Guest*, 8 H. L. Cas. 481; 35 Eng. L. & Eq. 487.

10 See *Hough v. Hunt*, 2 Ohio, 495, 502, 15 Am. Dec. 569; *Cathcart v. Robinson*, 5 Pet. 264.

11 *Ex parte Allen*, 15 Mass. 58, 65. Compare *Park v. Johnson*, 7 Allen, 378; *White v. McGannon*, 29 Gratt. 511.

### § 392. Specific Performance.

Specific performance is a mode of redress in equity, grounded upon the impracticability or inadequacy of legal remedies to compensate for the damages which the party seeking it will suffer by the default of the other party in keeping his bargain.<sup>1</sup> If the party can be indemnified in damages, courts of equity will not, unless other grounds of equitable relief be involved, accord this remedy.<sup>2</sup> The remedy is not a matter of absolute right in the party, but of sound discretion in the court;<sup>3</sup> the court holds it in judicial discretion, controlled by principles of equity and justice.<sup>4</sup> But where a contract for the sale of land is fair, certain, reasonable, and capable of being performed, it is almost a matter of course for a court of equity to decree a specific performance thereof;<sup>5</sup> for the value of the land, in the eyes of the purchaser, may depend upon circumstances of position, neighborhood, soil, and in general, upon considerations of taste or fancy, for which damages are no compensation.<sup>6</sup> The precise form in which the contract is expressed is immaterial, with respect to the right of specific

performance;<sup>7</sup> but it must possess, in substance, the qualities and requisites of a valid contract.<sup>8</sup> The bargain must have been completely determined between the parties, and its terms definitely ascertained.<sup>9</sup> So it must be mutual, and the tie reciprocal,<sup>10</sup> and be founded upon an adequate consideration;<sup>11</sup> otherwise, a court of equity will not enforce a performance.<sup>12</sup> If the land which is the subject of the contract is within the state, a bill for specific performance may be maintained, although the vendor is out of the jurisdiction.<sup>13</sup> So if the vendor be within the jurisdiction of the court, a contract made by him for the sale of lands lying in another state may be decreed.<sup>14</sup> The rule appears to be, that specific performance will be decreed whenever the parties, or the subject matter, or so much thereof as is sufficient to enable the court to enforce its decree, is within the jurisdiction of the court.<sup>15</sup>

1 *Brown v. Brown*, 33 N. J. Eq. 654.

2 *Wordsworth v. Manning*, 4 Md. 59; *McLane v. White*, 5 Minn. 178; *Marble Co. v. Ripley*, 10 Wall. 339; *Barnes v. Barnes*, 65 N. C. 261; *Pennsylvania Coal Co. v. Delaware etc. Canal Co.*, 31 N. Y. 91; *Comer v. Bankhead*, 70 Ala. 493; *Thweatt v. Jones*, 87 Fed. Rep. 268. Compare *Crary v. Smith*, 2 N. Y. 60; *White v. Butcher*, 6 Jones Eq. 231; *Richmond v. Dubuque etc. R. R. Co.*, 33 Iowa, 422; *Eastern etc. Ry. Co. v. Hawkes*, 5 H. L. Cas. 331; 35 Eng. L. & Eq. 8.

3 *Smoot v. Rea*, 19 Md. 398; *Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720; *Pickering v. Pickering*, 38 N. H. 400; *Blackwilder v. Loveless*, 21 Ala. 371; *Humbard v. Humbard*, 3 Head, 100; *Shriver v. Seiss*, 49 Md. 388; *Fish v. Lightner*, 44 Mo. 268; *Quinn v. Roath*, 37 Conn.

16; *McComas v. Easley*, 21 Gratt. 23; *Hale v. Wilkinson*, 21 Gratt. 75; *Sherman v. Wright*, 49 N. Y. 227; *Thurston v. Arnold*, 43 Iowa, 41; *Mitchell v. Steinmetz*, 97 Pa. St. 254; and see *Grier v. Rhyne*, 69 N. C. 347; *Millard v. Merwin*, 23 N. J. Eq. 419; *Hays v. Harmony Grove Cemetery*, 108 Mass. 400; *McNamee v. Withers*, 37 Md. 171; *Davenport v. Latimer*, 53 S. C. 563, 572.

4 *Brown v. Brown*, 33 N. J. Eq. 654; *Radcliffe v. Warrington*, 12 Ves. 332; *Pigg v. Corder*, 12 Leigh, 69; *Pullman v. Owen*, 25 Ala. 492; *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635; *St. John v. Benedict*, 6 Johns. Ch. 111; *Leigh v. Crump*, 1 Ired. Eq. 299; *Gillis v. Hall*, 2 Brewst. 342; *Hudson v. King*, 2 Heisk. 560; *Aston v. Robinson*, 49 Miss. 348; *Lowry v. Buffington*, 6 W. Va. 249; *Plummer v. Keppler*, 26 N. J. Eq. 481; *Fish v. Leser*, 69 Ill. 394; *Abbott v. L'Hommedieu*, 10 W. Va. 677; *Kofka v. Rosicky*, 41 Neb. 328, 43 Am. St. Rep. 685, and note; *Chabot v. Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192. The court cannot alter the contract and then enforce it: *Grey v. Tubbs*, 43 Cal. 359; *Farwell v. Meyer*, 35 Ill. 40; *Risom v. Newberry*, 90 Va. 521. And specific performance will not be decreed if there was a subsequent agreement by parol to waive it and substitute a new one: *Ryno v. Darby*, 20 N. J. Eq. 231.

5 *Schroepel v. Hopper*, 40 Barb. 425; *Old Colony R. Co. v. Evans*, 6 Gray, 36, 66 Am. Dec. 394; *Williams v. McGuire*, 60 Mo. 254; *Brown v. Crane*, 47 Ga. 483; *Johnson v. Rickett*, 5 Cal. 218; *Chance v. Beall*, 20 Ga. 143; *Hopper v. Hopper*, 16 N. J. Eq. 147; *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635; *St. Paul Division v. Brown*, 9 Minn. 157. Equity regards a contract for land of which a specific execution will be decreed, for most purposes, as if it had been specifically executed: *Huffman v. Hummer*, 17 N. J. Eq. 263. Specific performance of an antenuptial agreement for the use of land may be enforced in favor of a husband against his wife: *Stratton v. Stratton*, 58 N. H. 473, 42 Am. Rep. 604.

6 *M'Garvey v. Hall*, 23 Cal. 140; *Ensign v. Kellogg*, 4 Pick. 1; *Brown v. Brown*, 33 N. J. Eq. 654; *Willard v. Tayloe*, 8 Wall. 557; *Bogan v. Daughdrill*, 51 Ala. 312; *Adderley v. Dixon*, 1 Sim. & St. 607; *Harnett v. Yeilding*, 2 Schoales & L. 553.

7 See *Hooker v. Pyncheon*, 8 Gray, 550; *Bull v. Bell*, 4 Wis. 54; *Dooley v. Watson*, 1 Gray, 414; *Clark v. Burnham*, 2 Story, 1; *Hutton v. Williams*, 35 Ala. 503, 76 Am. Dec. 297; *Bagden v. Bradbear*, 12 Ves. 466; *Hull v. Sturdivant*, 46 Me. 34; *Peters v. Phillips*, 19 Tex. 70, 70 Am. Dec. 319; *Lerned v. Wannemacher*, 9 Allen, 416.

8 See *Semmes v. Worthington*, 38 Md. 298; *Rust v. Conrad*, 47 Mich. 449, 41 Am. Rep. 720; *Minturn v. Baylis*, 33 Cal. 129; *Ralls v. Ralls*, 82 Ill. 243; *Galbraith v. Galbraith*, 5 Kan. 402; *Chandler v. Johnson*, 39 Ga. 85; *Caton v. Caton*, L. R. 1 Ch. App. 137.

9 *Ridgway v. Wharton*, 6 H. L. Cas. 238; *Brown v. Brown*, 33 N. J. Eq. 650; *Brown v. Lord*, 7 Or. 302; *Barnett v. Nichols*, 56 Miss. 622; *Hammer v. McEl-downey*, 46 Pa. St. 334; *Jordan v. Deaton*, 23 Ark. 74; *Patrick v. Horton*, 3 W. Va. 23; *Soles v. Hickman*, 20 Pa. St. 180; *Brown v. Brown*, 47 Mich. 378; *Bracken v. Hambrick*, 25 Tex. 408; *Myers v. Forbes*, 24 Md. 598; *Jordon v. Fay*, 40 Me. 130. And only those contracts which are fair, just, and reasonable will be specifically enforced: *Smith v. Crandall*, 20 Md. 482; *Morrison v. Peay*, 21 Ark. 110; *Reed v. Radmun*, 5 Ind. 409; *Chubb v. Peckham*, 13 N. J. Eq. 207; *Huntington v. Rogers*, 9 Ohio St. 511; *Davidson v. Little*, 22 Pa. St. 245, 60 Am. Dec. 85; *Smith v. Wood*, 12 Wis. 382.

10 *Benedict v. Lynch*, 1 Johns. Ch. 370, 7 Am. Dec. 484; *Jones v. Noble*, 3 Bush, 694; *Tarr v. Scott*, 4 Brewst. 49; *Marble Co. v. Ripley*, 10 Wall. 339; *Maynard v. Brown*, 41 Mich. 298; *Bodine v. Glading*, 21 Pa. St. 50, 59 Am. Dec. 749; *Duvall v. Myers*, 2 Md. Ch. 401; *Reese v. Reese*, 41 Md. 554. It will be remembered, however, that a written agreement concerning lands may be enforced in equity, although binding only on the party to be charged: *Rogers v. Saunders*, 16 Me. 92, 33 Am. Dec. 635; *Lord Ormond v. Anderson*, 2 Ball & B. 363; and see sec. 377, ante; *White v. Schuyler*, 31 How. Pr. 38; 1 Abb. Pr., N. S., 300; *Muller v. Vettel*, 25 How. Pr. 350; *Seton v. Slade*, 7 Ves. 265.

11 *Andrews v. Andrews*, 28 Ala. 432; *Vasser v. Vasser*, 23 Miss. 378; *Bayler v. Commonwealth*, 40 Pa. St. 37, 80 Am. Dec. 551; *Hoig v. Adrian College*, 83 Ill. 267; *Peacock v. Monk*, 1 Madd. 413; *Cochrane v. Willis*, 34 Beav. 359. The contract must be founded upon a

valuable, as distinguished from a merely good or moral, consideration: *Wallace v. Rappleye*, 103 Ill. 229.

12 *Ewing v. Gordon*, 49 N. H. 444; *Viele v. Troy etc. R. R. Co.*, 21 Barb. 381. See *Harrison v. Town*, 17 Mo. 237.

13 *Rourke v. McLaughlin*, 38 Cal. 196; *Gartrell v. Stafford*, 12 Neb. 550, 41 Am. Rep. 767; and see *Matteson v. Scofield*, 27 Wis. 671.

14 *Myres v. Demier*, 4 Daly, 343; *Olney v. Eaton*, 66 Mo. 563; *Newton v. Bronson*, 13 N. Y. 587, 67 Am. Dec. 89; *Gardner v. Ogden*, 22 N. Y. 327, 78 Am. Dec. 192; *Davis v. Parker*, 14 Allen, 94; *Penn v. Baltimore*, 1 Ves. Sr. 444; *Massie v. Watts*, 6 Cranch, 148, 158. Compare *Penn v. Hayward*, 14 Ohio St. 302. Specific performance of a contract to convey land in Massachusetts may be decreed against an inhabitant of another state, who has been personally served with notice in the former state: *Dooley v. Watson*, 1 Gray, 414.

15 *Rourke v. McLaughlin*, 38 Cal. 196; *Loaiza v. Superior Ct.*, 85 Cal. 32, 20 Am. St. Rep. 209.

### § 392a. Same—Continued.

It is well settled that specific performance of a contract is not a matter of absolute right to him who asks it, but rests in the sound discretion of the court, in view of all the circumstances.<sup>1</sup> Even where the agreement is perfectly good, the price adequate, and no blame attaches to the purchase, if the transaction be inequitable and unjust in itself, or rendered so by matters subsequently occurring, specific performance may be denied, and the parties turned over to their remedies in damages.<sup>2</sup> An unconscionable price, a clouded title, any circumstances of overreaching, misrepresentation, suppression of the truth, suggestion of the false, fraud of any kind, breach of confidential

relation, and other similar causes will induce a court to refuse specific performance.<sup>3</sup> Contracts, in order to be enforced by specific performance, must be mutual in obligation as well as remedy.<sup>4</sup> Such is the general rule;<sup>5</sup> but the rule has no application to a contract which is an option to sell real estate at a specified price.<sup>6</sup> Specific performance will not be compelled if the title to the land is so uncertain as to affect its market value. A court of equity will not compel a purchaser to take a doubtful title.<sup>7</sup> So equity will only enforce a parol contract for an interest in land when the contract is definite and certain in all its parts.<sup>8</sup> If an owner of land enters into an oral contract to sell it, and subsequently executes a written agreement to sell the same land to another party, the latter is not entitled to specific performance of his contract in order to prevent the vendor from executing and carrying out the first contract.<sup>9</sup> Where the plaintiff contracted to sell and the defendant to buy a leasehold interest in land, to commence in the future, and before the day an ocean storm washed away part of the land, specific performance was denied.<sup>10</sup> One who seeks specific performance must not be guilty of unreasonable delay.<sup>11</sup> But unless time be of the essence of the contract, the courts are reluctant to refuse relief on the ground of mere delay.<sup>12</sup> And delay is held to work no harm where there has been continued acquiescence on both sides.<sup>13</sup> But

such delay as raises a presumption that the party has abandoned the contract is held to be unreasonable, and is equivalent to consent to rescission.<sup>14</sup> If a contract for the sale of land is shown to contain a stipulation inserted by mistake instead of the real agreement of the parties, a court of equity will in the same proceeding reform the agreement and decree a specific performance thereof.<sup>15</sup> While it is well settled as a general rule that, in order to maintain a suit for specific performance against a purchaser of real estate, the plaintiff must show that the title is good beyond a reasonable doubt,<sup>16</sup> yet the mere possibility or suspicion of a defect is not enough to relieve a purchaser from liability under his contract.<sup>17</sup> The doubt must be reasonable, and such as would cause a prudent man to pause and hesitate before investing his money.<sup>18</sup> And if the purchaser, at the time of sale, knows of a defect in the title, or has means of knowing of it, and fails to avail himself of such means, he cannot afterward refuse to comply upon the ground of such defect.<sup>19</sup>

1 See *New Orleans v. Railroad Co.*, 44 La. Ann. 64; *Ford v. Foker*, 86 Va. 75; *Conger v. Railroad Co.*, 120 N. Y. 29; *Sloan v. Williams*, 138 Ill. 43; *Andrew v. Babcock*, 63 Conn. 109; *Ramsay v. Gheen*, 99 N. C. 215; *Datz v. Phillips*, 137 Pa. St. 203, 21 Am. St. Rep. 864; *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404; *Nickerson v. Nickerson*, 127 U. S. 668; *Blake v. Flatley*, 44 N. J. Eq. 228, 6 Am. St. Rep. 886.

2 *Rennyson v. Rozell*, 106 Pa. St. 407; *Elbert v. O'Neil*, 102 Pa. St. 302.

3 *Friend v. Lamb*, 152 Pa. St. 529, 34 Am. St. Rep. 672; and so, to same effect, *Eaton v. Eaton*, 64 N. H. 493; *Brown v. Pitcairn*, 148 Pa. St. 387, 33 Am. St. Rep. 834; *Claypool v. Commissioners*, 132 Ind. 261; *McElroy v. Maxwell*, 101 Mo. 294; *Swint v. Carr*, 76 Ga. 322, 2 Am. St. Rep. 44.

4 *Publishing Co. v. Telegraph Co.*, 83 Ala. 498, 3 Am. St. Rep. 758. Compare *Eckstein v. Downing*, 64 N. H. 248, 10 Am. St. Rep. 404; *McPherson v. Fargo*, 10 S. Dak. 611, 66 Am. St. Rep. 723; *Welch v. Whelpley*, 62 Mich. 15, 4 Am. St. Rep. 810.

5 See *Banbury v. Arnold*, 91 Cal. 606; *Ross v. Parks*, 93 Ala. 153, 30 Am. St. Rep. 47; *Lattin v. Hazard*, 91 Cal. 87.

6 *House v. Jackson*, 24 Or. 89; *Warren v. Castello*, 109 Mo. 338, 32 Am. St. Rep. 668; *Ide v. Leiser*, 10 Mont. 5, 24 Am. St. Rep. 17; *Watts v. Kellar*, 56 Fed. Rep. 1; and see *McPherson v. Fargo*, 10 S. Dak. 611, 66 Am. St. Rep. 723; *South etc. R. R. Co. v. Railroad Co.*, 98 Ala. 400, 39 Am. St. Rep. 74; *Railroad Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189. But compare *Gustin v. School Dist.*, 94 Mich. 502, 34 Am. St. Rep. 361, and note; *Graybill v. Brugh*, 89 Va. 895, 37 Am. St. Rep. 894.

7 *Townshend v. Goodfellow*, 40 Minn. 312, 12 Am. St. Rep. 736; *Turner v. McDonald*, 76 Cal. 177, 9 Am. St. Rep. 189; *Vought v. Williams*, 120 N. Y. 253, 17 Am. St. Rep. 634.

8 *Crosdale v. Lanigan*, 129 N. Y. 604, 26 Am. St. Rep. 551; and see *Hamilton v. Harvey*, 121 Ill. 469, 2 Am. St. Rep. 118; *Robbins v. Kimball*, 55 Ark. 414, 29 Am. St. Rep. 45, and note; *Cutler v. Babcock*, 81 Wis. 195, 29 Am. St. Rep. 882, and note, as to acts of part performance such as will take a parol contract out of the statute of frauds.

9 *Maguire v. Heraty*, 163 Pa. St. 381, 43 Am. St. Rep. 800.

10 *Huguenin v. Courtenay*, 21 S. C. 403, 53 Am. Rep. 688.

11 *Tate v. Development Co.*, 37 Fla. 439, 53 Am. St. Rep. 251; *Hatch v. Kizer*, 140 Ill. 583, 33 Am. St. Rep. 258; *Davison v. Davis*, 125 U. S. 90.

12 *Sanford v. Weeks*, 38 Kan. 319, 5 Am. St. Rep. 748; *Coleman v. Applegarth*, 68 Md. 21, 6 Am. St. Rep.



417; *Seaver v. Hall*, 50 Neb. 878; and see *Martin v. Morgan*, 87 Cal. 203, 22 Am. St. Rep. 240.

13 *Welch v. Whelpley*, 62 Mich. 15, 4 Am. St. Rep. 810. Compare *Requa v. Snow*, 76 Cal. 590; *Holgate v. Eaton*, 116 U. S. 33; *Karns v. Olney*, 80 Cal. 90, 13 Am. St. Rep. 101.

14 *Chabot v. Winter Park Co.*, 34 Fla. 258, 43 Am. St. Rep. 192; and see *Davenport v. Latimer*, 53 S. C. 563.

15 *Popplein v. Foley*, 61 Md. 381; *O'Keefe v. Irvington Co.*, 87 Md. 196. See sec. 388, ante.

16 See *Sturtevant v. Jaques*, 14 Allen, 523; *Jeffries v. Jeffries*, 117 Mass. 184.

17 *Dow v. Whitney*, 147 Mass. 1; *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400.

18 *First African etc. Soc. v. Brown*, 147 Mass. 296, 298; *Conley v. Finn*, 171 Mass. 70, 68 Am. St. Rep. 399.

19 *Charleston v. Blohme*, 15 S. C. 124, 40 Am. Rep. 690; *Davenport v. Latimer*, 53 S. C. 563.

### § 393. Vendor's Lien.

It is an equitable doctrine, well established in England, and generally recognized in this country, that, in the absence of an agreement express or implied to the contrary, the vendor of lands has a lien on them for the unpaid purchase money.<sup>1</sup> It is an equitable right to be resorted to in case the purchase money is not paid,<sup>2</sup> and it will be enforced in favor of any subsequent holder who becomes rightfully the owner of the claim or demand.<sup>3</sup> It attaches where the sale is by operation of law, as well as where it is by voluntary contract,<sup>4</sup> and whether the estate has been conveyed to the vendee, or is only contracted to be conveyed.<sup>5</sup> And it exists not only against the vendee and his heirs, and other privies in estate,<sup>6</sup> but also

against all subsequent purchasers,<sup>7</sup> except purchasers for value, in good faith, without notice of the original vendor's equity.<sup>8</sup> And where a recorded deed recited that the consideration "was secured" to be paid by the grantee, it was held that one who claimed title under him was thereby notified that the purchase money had not been paid, and he was put on inquiry, and could not take the land divested of the vendor's lien.<sup>9</sup> And, generally, a purchaser who at the time of sale is in possession of facts which would put an ordinarily prudent man upon inquiry, as to the existence of a vendor's lien upon the property purchased, will be held to take subject to the lien.<sup>10</sup> And no one is protected as a bona fide purchaser, although he purchases without notice, if he pays after notice.<sup>11</sup> In order that a person may be protected as a bona fide purchaser for value without notice against a prior equity or conveyance, it must appear that he is the purchaser of the legal as distinguished from an equitable title;<sup>12</sup> that he purchased the same in good faith;<sup>13</sup> that he parted with value as a consideration therefor, by paying money or other thing of value, assuming a liability or incurring an injury;<sup>14</sup> and that he had no notice, and knew no fact sufficient to put him on inquiry, either at the time of his purchase or at or before the time he paid the purchase money or otherwise parted with such value.<sup>15</sup> A lien equivalent to a vendor's lien exists in case of a

grant of way, where the consideration for the grant is not paid.<sup>16</sup> But it is held that a vendor's lien does not arise from the sale of both real and personal property for one entire sum or consideration, where no distinct price is set upon the real property.<sup>17</sup>

1 *Mackreth v. Symons*, 15 Ves. 327; *Burns v. Taylor*, 23 Ala. 255; *Burks v. Watson*, 48 Tex. 107; *Anderson v. Griffith*, 66 Mo. 44; *Magruder v. Campbell*, 40 Ala. 611; *Yancey v. Mauck*, 15 Gratt. 300; *Allen v. Loring*, 34 Iowa, 499; *Herbert v. Scofield*, 9 N. J. Eq. 492; *Davis v. Lamb*, 30 Mo. 441; *Jackson v. McChesney*, 7 Cow. 360, 17 Am. Dec. 520; *Dubois v. Hall*, 43 Barb. 26; *Hall v. Jones*, 21 Md. 439; *Servis v. Beatty*, 32 Miss. 52; *Neil v. Kinney*, 11 Ohio St. 58; *Waddell v. Curlock*, 41 Ark. 523; *Sykes v. Betts*, 87 Ala. 537; *McKeown v. Collins*, 38 Fla. 287; *Dunton v. Outhouse*, 64 Mich. 419; *Longmaid v. Coulter*, 123 Cal. 208; *Bayley v. Greenleaf*, 7 Wheat. 46. In some of the states the doctrine as to equitable liens has been wholly rejected: See *Edminster v. Higgins*, 6 Neb. 265; *Simpson v. Munde*, 3 Kan. 173; *Greeno v. Barnard*, 18 Kan. 518; *Hepburn v. Snyder*, 3 Pa. St. 72; *Stephen's Appeal*, 38 Pa. St. 9; *Heist v. Baker*, 49 Pa. St. 9; *Ahrend v. Odiorne*, 118 Mass. 261, 19 Am. Rep. 449; *Philbrook v. Delano*, 29 Me. 415; *Gee v. McMillan*, 14 Or. 268, 58 Am. Rep. 315; *Frame v. Sliter*, 29 Or. 121, 54 Am. St. Rep. 781; *Smith v. Allen*, 18 Wash. 1, 63 Am. St. Rep. 864; *Peck v. Culberson*, 104 N. C. 425; in others, the matter is undecided: See *Chapman v. Beardsley*, 31 Conn. 115; *Arlin v. Brown*, 44 N. H. 102. Abolished in Vermont and in Virginia by statute: See Vt. Stats. 1862, c. 65, sec. 33; *Yancey v. Mauck*, 15 Gratt. 300.

2 *Baum v. Grigsby*, 21 Cal. 172, 81 Am. Dec. 153; *Gee v. McMillan*, 14 Or. 268, 58 Am. Rep. 315; *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272; and see *Burns v. Taylor*, 23 Ala. 255; *Buford v. McCormick*, 57 Ala. 428; *Hughes v. Kearney*, 1 Schoales & L. 135; *Keith v. Horner*, 32 Ill. 524; *Allen v. Loring*, 34 Iowa, 499; *Mitchell v. Butt*, 45 Ga. 162.

3 *Conner v. Banks*, 18 Ala. 42, 52 Am. Dec. 209; *Bu-ford v. McCormick*, 57 Ala. 428. See *Murray v. Able*, 18 Tex. 213; *Walker v. Williams*, 36 Miss. 165; *Rake-straw v. Hamilton*, 14 Iowa, 147. In some of the states it has been held that when notes given for land are transferred, the vendor's lien, if subsisting, also passes to the assignee: See *Rakestraw v. Hamilton*, 14 Iowa, 147; *Upland Land Co. v. Ginn*, 144 Ind. 434, 55 Am. St. Rep. 181; *Sloan v. Campbell*, 71 Mo. 387, 36 Am. Rep. 493; *Watt v. White*, 33 Tex. 421; *Lewis v. Pusey*, 8 Bush, 615; *Lagow v. Badollet*, 1 Blackf. 416, 12 Am. Dec. 258; *Parker v. Kelly*, 18 Miss. 184; *Honore v. Bakewell*, 6 B. Mon. 67, 43 Am. Dec. 147. On the other hand, it has been held that a vendor's lien is not a matter of transfer, and cannot be assigned, even by express language, with the note taken for the purchase money: *Hecht v. Spears*, 27 Ark. 229, 11 Am. Rep. 784; and see *Gann v. Chester*, 5 Yerg. 205; *Thorpe v. Dunlap*, 4 Heisk. 674; *Webb v. Robinson*, 14 Ga. 216; *Ross v. Heintzen*, 36 Cal. 313; *Hallock v. Smith*, 3 Barb. 267; *Dixon v. Dixon*, 1 Md. Ch. 220; *Keith v. Horner*, 32 Ill. 526; *Avery v. Clark*, 87 Cal. 619, 22 Am. St. Rep. 272; *Martin v. Martin*, 164 Ill. 640, 56 Am. St. Rep. 219, and note.

4 *Mims v. Macon etc. R. R. Co.*, 3 Ga. 333.

5 *Hill v. Grigsby*, 32 Cal. 55.

6 *Burt v. Wilson*, 28 Cal. 632, 87 Am. Dec. 142; *Champion v. Brown*, 6 Johns. Ch. 398; *Carr v. Hobbs*, 11 Md. 285; *Merritt v. Wells*, 18 Ind. 171; *Thornton v. Knox*, 6 B. Mon. 74; *Davis v. Pearson*, 44 Miss. 508.

7 *Craft v. Russell*, 67 Ala. 9; *Dickerson v. Carroll*, 76 Ala. 377; *Rice v. Wilburn*, 31 Ark. 108, 25 Am. Rep. 549.

8 *Davis v. Pearson*, 44 Miss. 508; *Craft v. Russell*, 67 Ala. 9; *Moore v. Anders*, 14 Ark. 628, 60 Am. Dec. 551. Vendor's lien may be enforced against married woman: *Kent v. Gerhard*, 12 R. I. 92, 34 Am. Dec. 612; *Jackson v. Rutledge*, 3 Lea, 626, 31 Am. Rep. 655; *Cox v. Wood*, 20 Ind. 54; and see *Cashman v. Henry*, 75 N. Y. 103, 31 Am. Rep. 437; or against a purchaser on an execution sale of land: *Rice v. Wilburn*, 31 Ark. 108, 25 Am. Rep. 549.

9 *Willis v. Gay*, 48 Tex. 463, 26 Am. Rep. 328.

10 *Major v. Bukley*, 51 Mo. 227; *Maybin v. Kirby*, 4 Rich. Eq. 105; *Wilson v. Miller*, 16 Iowa, 111.

11 *Palmer v. Williams*, 24 Mich. 328; and see *Penfield v. Dunbar*, 64 Barb. 239.

12 *Oakley v. Bullard*, 1 Hemp. 475; *Boone v. Chiles*, 10 Pet. 177; *Brown v. Wood*, 6 Rich. Eq. 155; *Ledbetter v. Walker*, 31 Ala. 175; *Mundine v. Pitts*, 14 Ala. 84; *Kearney v. Vaughn*, 50 Mo. 284; *Daniel v. Hollingshead*, 16 Ga. 190; *Iddings v. Cairns*, 2 Grant Cas. 88.

13 *Merritt v. Northern R. R. Co.*, 12 Barb. 605; *Robson v. Osborn*, 13 Tex. 298; *McCulloch v. Doak*, 68 N. C. 267.

14 *Johnson v. Graves*, 27 Ark. 557; *Baze v. Arper*, 6 Minn. 220; *Patten v. Moore*, 32 N. H. 382; *De Mott v. Starkey*, 3 Barb. 403; *Lloyd v. Lynch*, 28 Pa. St. 419, 70 Am. Dec. 137; *Campbell v. Campbell*, 11 N. J. Eq. 268; *Johnson v. Graves*, 27 Ark. 557; *Spicer v. Waters*, 65 Barb. 227; *Morrison v. Daniels*, 35 Ohio St. 406.

15 *Kilcrease v. Lum*, 36 Miss. 569; *Everts v. Agnes*, 4 Wis. 343; *Duncan v. Johnson*, 13 Ark. 190; *Palmer v. Williams*, 24 Mich. 328; *Craft v. Russell*, 67 Ala. 9; *Maroney v. Boyle*, 141 N. Y. 462, 38 Am. St. Rep. 821; *Beckett v. Tyler*, 3 McAr. 319. A vendor may enforce his equitable lien for the unpaid purchase money, although an action on the note or debt is barred by the statutes of limitation: *Ware v. Curry*, 67 Ala. 274. See sec. 394, post.

16 *Howe v. Harding*, 76 Tex. 17, 18 Am. St. Rep. 17; and so, to same effect, *Dayton etc. Ry. Co. v. Lewton*, 20 Ohio St. 401; *Ferrers v. Railway Co.*, L. R. 13 Eq. 524; *Munns v. Railway Co.*, L. R. 8 Eq. 653.

17 *Peters v. Tunell*, 43 Minn. 473, 19 Am. St. Rep. 252; *Wilkinson v. Parmer*, 82 Ala. 367.

### § 394. Waiver of Vendor's Lien.

A vendor of land has a lien thereon for the unpaid purchase money as long as he shows no purpose of releasing the land and taking other security;<sup>1</sup> but any act on his part which shows an intention to release the land waives or divests the lien.<sup>2</sup> Taking separate securities for the purchase

money is *prima facie* a waiver of the lien;<sup>3</sup> as, for instance, the taking of a mortgage,<sup>4</sup> or the promissory note of the vendee with security.<sup>5</sup> And it is held that one who takes in payment the secured and indorsed note of a third person, supposed to be good, thereby waives his lien, although it proves worthless.<sup>6</sup> But taking any instrument involving merely the personal liability of the vendee is not a waiver of the vendor's lien.<sup>7</sup> And it has been held that a vendor does not waive his lien by accepting a guaranteed note therefor.<sup>8</sup> Nor is it forfeited by his acceptance of a mortgage for the purchase price which turns out to be forged.<sup>9</sup> And generally, as against the purchaser, it is held that a vendor does not lose his lien by taking securities known to the purchaser to be worthless, but represented to be good.<sup>10</sup> A receipt of a part of the price of land is held to be no waiver of a vendor's lien for the balance.<sup>11</sup> An abandonment of the vendor's equitable lien, once fairly and voluntarily made, is an abandonment forever.<sup>12</sup>

1 *Wasson v. Davis*, 34 Tex. 167; *Bradford v. Marvin*, 2 Fla. 463.

2 *Boss v. Eding*, 17 Ohio, 500, 49 Am. Dec. 478; *Moshier v. Meek*, 80 Ill. 79; *Boon v. Murphy*, 6 Blackf. 272; *Griffin v. Blanchard*, 17 Cal. 70; *Selby v. Stanley*, 4 Minn. 65; *Parker v. Sewell*, 24 Tex. 238; *Smith v. Smith*, 9 Abb. Pr., N. S., 420.

3 *Schurz v. Stein*, 27 Ind. 112; *Boyton v. Champlain*, 42 Ill. 57; *Yaryan v. Shriner*, 26 Ind. 364; *Woodall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 57. Compare *Pitts v. Parker*, 44 Miss. 247; *Perry v. Grant*, 10 R. I. 334;

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Faver v. Robinson, 46 Tex. 204; Hollis v. Hollis, 4 Baxt. 524.

4 Pease v. Kelly, 3 Or. 417; Camden v. Vail, 23 Cal. 633; Avery v. Clark, 87 Cal. 619, 22 Am. St. Rep. 272; Seymour v. McKinstry, 106 N. Y. 230; Shelby v. Perrin, 18 Tex. 515; Stuart v. Harrison, 52 Iowa, 511; Neal v. Speigle, 33 Ark. 63. But compare Wasson v. Davis, 34 Tex. 159; De Forest v. Holum, 38 Wis. 516; Anketel v. Converse, 17 Ohio St. 11, 91 Am. Dec. 115; Doughaday v. Paine, 6 Minn. 443.

5 Johnson v. Thompson, 4 J. J. Marsh. 380; Vail v. Foster, 4 N. Y. 312; Johnson v. Sugg, 21 Miss. 346; Trustees etc. v. Wright, 11 Ill. 603; Yaryan v. Shriner, 26 Ind. 364; Carrico v. Merchants' etc. Bank, 33 Md. 235; Stevens v. Rainwater, 4 Mo. App. 292.

6 Kendrick v. Eggleston, 56 Iowa, 128, 41 Am. Rep. 90; and see Hunt v. Waterman, 12 Cal. 301.

7 Gordon v. Green, 1 Johns. Ch. 308; Corlies v. Howland, 26 N. J. Eq. 311; Mauly v. Slason, 21 Vt. 271, 52 Am. Dec. 60; Baum v. Grigsby, 21 Cal. 172, 81 Am. Dec. 153; Brinckerhoff v. Van Sciven, 4 N. J. Eq. 251; Christian v. Austin, 36 Tex. 540; Denny v. Steakly, 2 Heisk. 156; Skinner v. Purnell, 52 Mo. 97; Dunlap v. Shanklin, 10 W. Va. 662; Manly v. Slason, 21 Vt. 271, 52 Am. Dec. 60; Napier v. Jones, 47 Ala. 90; Lavender v. Abbott, 30 Ark. 172; Dowdy v. Blake, 50 Ark. 205, 7 Am. St. Rep. 88; Burgess v. Fairbanks, 83 Cal. 215, 17 Am. St. Rep. 230; Maroney v. Boyle, 141 N. Y. 462; 38 Am. St. Rep. 821.

8 Burrus v. Roulhac, 2 Bush, 39.

9 Fouch v. Wilson, 60 Ind. 64, 28 Am. Rep. 651; and see Tobey v. McAllister, 9 Wis. 463.

10 Tobey v. McAllister, 9 Wis. 463; McDole v. Purdy, 23 Iowa, 277.

11 Tobey v. McAllister, 9 Wis. 463. Compare Codwise v. Taylor, 4 Sneed, 346.

12 Harris v. Harlan, 14 Ind. 439; Camden v. Vail, 23 Cal. 633; Wilson v. Hunter, 30 Ind. 466; and see Avent v. McCorkle, 45 Miss. 221; Mattix v. Weand, 19 Ind. 151. But compare Hollis v. Hollis, 4 Baxt. 524; Cotton v. McGehee, 44 Miss. 510.

**§ 394a. Same—Continued.**

The question of waiver of a vendor's lien is one of fact, or intention manifested by acts or declarations of the contracting parties, and the burden of proof is always cast on the purchaser to affirmatively establish such waiver.<sup>1</sup> If the vendor takes the note of a third person for the amount of the purchase price, but retains the legal title, such note will not be presumed to have been accepted as payment, and will not deprive the vendor of the right to hold the land as security.<sup>2</sup> The lien is held to be waived pro tanto by accepting the note of a third person for a part of the purchase money.<sup>3</sup> So it may be lost by mingling the debts secured thereby with other debts.<sup>4</sup> The lien of a vendor reserved in the face of the deed expires when the debt is barred by the statute of limitations.<sup>5</sup> But it is held that a vendor's equitable lien is not lost because the statute of limitations has barred the action upon notes given for the purchase money.<sup>6</sup> A vendor's lien cannot be said to exist where no title has been conferred upon the supposed purchaser.<sup>7</sup> Nor does it exist when the vendee, in consideration of the conveyance of land to him, gives his contract to deliver the vendor specified quantities of personal property.<sup>8</sup> The lien of a vendor who has made a conveyance of the legal title is waived by an assignment or indorsement of the note or notes given for the purchase money, but the lien existing in favor of a



vendor who retains the title as security for the purchase money is not so waived.<sup>9</sup>

1 *Crampton v. Prince*, 83 Ala. 246, 3 Am. St. Rep. 718; *Woodall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 757; *Dunton v. Outhouse*, 64 Mich. 419.

2 *Mansfield v. Dameron*, 42 W. Va. 794, 57 Am. St. Rep. 884.

3 *Wisconsin etc. Bank v. Filer*, 83 Mich. 496.

4 *Erickson v. Smith*, 79 Iowa, 374.

5 *Chase v. Cartright*, 53 Ark. 358, 22 Am. St. Rep. 207; and see *Tate v. Hawkins*, 81 Ky. 577, 50 Am. Rep. 181.

6 *Bizzell v. Nix*, 60 Ala. 281, 31 Am. Rep. 38.

7 *Harper v. Wilkings*, 65 Miss. 215.

8 *Bell v. Pelt*, 51 Ark. 433, 14 Am. St. Rep. 57. Compare *Parrish v. Hastings*, 102 Ala. 414, 48 Am. St. Rep. 50; *Deason v. Taylor*, 53 Miss. 700.

9 *Longmaid v. Coulter*, 123 Cal. 208; and see *Fitzell v. Leaky*, 72 Cal. 477.

### § 395. Enforcement of Vendor's Lien.

The right to sue at law upon the securities given for the purchase of land, and in equity to enforce the vendor's lien, are distinct and independent rights;<sup>1</sup> and it is held that the vendor can pursue either or both remedies at the same time.<sup>2</sup> It is not necessary that he should first exhaust his remedy at law;<sup>3</sup> nor is he bound to show that the vendee has no personal property subject to execution.<sup>4</sup> Nor is proof of a demand before suit necessary to sustain a suit to enforce a vendor's lien;<sup>5</sup> bringing the suit is held a sufficient demand.<sup>6</sup> It has been held that a vendor's lien cannot be enforced after the bar of the statute of limi-

tations has attached to the debt.<sup>7</sup> But the opposite rule is established in Alabama.<sup>8</sup> In proceedings to enforce a vendor's lien, not only the original purchaser, but, if the land has been resold by him and the purchaser is dead, the heirs and personal representatives, should all be made parties.<sup>9</sup> If the purchaser assumes, as part or the whole of the agreed purchase money, a debt which his vendor owes to a third person, and gives his note, payable to such third person, by mutual agreement among the three, the note continues to be a charge on the land as a vendor's lien, and, unless waived, may be enforced by the payee by bill in equity in his own name.<sup>10</sup> A wife, as executrix and sole legatee of her deceased husband, may enforce a vendor's lien upon real estate conveyed by him in his lifetime.<sup>11</sup> If a married woman purchases land through the agency of her husband, who, in her name and by her authority, executes a promissory note for the unpaid balance of the purchase money, her coverture is no defense to a suit in equity to enforce a vendor's lien on the land, though she could not be sued at law on the note.<sup>12</sup> The enforcement of a vendor's lien is not prevented by a verbal agreement by the vendee to reconvey if he does not pay the purchase price.<sup>13</sup>

1 Richardson v. Baker, 5 J. J. Marsh. 323; Black v. Hunter, 3 J. J. Marsh. 558; Payne v. Harrell, 40 Miss. 498.

2 Payne v. Harrell, 40 Miss. 498; Pratt v. Clark, 57 Mo. 189; Stewart v. Caldwell, 54 Mo. 536; Chapman v.

Lee, 64 Ala. 483. But compare *Walker v. Sedgwick*, 8 Cal. 398.

3 *Mayes v. Hendry*, 33 Ark. 240; *Burgess v. Fairbanks*, 83 Cal. 215, 17 Am. St. Rep. 230.

4 *Smith v. Rowland*, 13 Kan. 245; and see *Sparks v. Hess*, 15 Cal. 186; *Harvey v. Kelly*, 41 Miss. 490, 93 Am. Dec. 267; *Hutchinson v. Patrick*, 22 Tex. 318; *Carpenter v. Mitchell*, 54 Ill. 126.

5 *Gallagher v. Mars*, 50 Cal. 23. A suit to enforce a vendor's lien is not barred by a judgment obtained on the note: *Waldron v. Zacharie*, 54 Tex. 503.

6 *Gallagher v. Mars*, 50 Cal. 23.

7 *Linthicum v. Tapscott*, 28 Ark. 267; *Ilett v. Collins*, 103 Ill. 74. But see *Coldcleugh v. Johnson*, 34 Ark. 312.

8 *Shorter v. Frazer*, 64 Ala. 74; *Ware v. Curry*, 67 Ala. 275.

9 *Mullins v. Sparks*, 43 Miss. 129; and see *Curtis v. Buckley*, 14 Kan. 449; *Brightwell v. Hoover*, 7 W. Va. 342; *Carter v. Ottoway*, 46 Tex. 108; *Simmons v. Lyles*, 27 Gratt. 922. Subsequent purchasers, or encumbrancers not made parties, are not bound by the decree, and their right to redeem is not barred: *Haskell v. State*, 31 Ark. 91.

10 *Carver v. Eads*, 65 Ala. 190; *Woodall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 57.

11 *Curtis v. Clarke*, 113 Mich. 458.

12 *Crampton v. Prince*, 83 Ala. 246, 3 Am. St. Rep. 718.

13 *Gallagher v. Mars*, 50 Cal. 23.

### § 396. Vendee's Lien.

Where a vendee has paid money upon a contract for the purchase of land, which is rescinded by the fault of the vendor, he has an equitable lien on the land for the reimbursement of the money advanced, similar to that of the vendor for the unpaid purchase money.<sup>1</sup> The natural equity

and intrinsic justice of this lien are said to commend it to the favorable consideration of a court of equity;<sup>2</sup> and it is held to attach even as against a subsequent purchaser with notice.<sup>3</sup> And it is held to be superior to the lien of a judgment against the vendor rendered subsequent to the sale, and before the conveyance of the title.<sup>4</sup> If the vendee has entered into possession of the land and made valuable improvements thereon, his lien attaches for their value;<sup>5</sup> and he should not be compelled to surrender until such value is paid or secured.<sup>6</sup> But the vendor should be allowed a lien for money expended by him in payment of delinquent taxes accruing on the land during the time the vendee had possession and use of the property under the contract.<sup>7</sup>

1 *Ludlow v. Gravall*, 11 Price, 58; *Cator v. Pembroke*, 1 Brock. 301; *Money v. Dorsey*, 7 Smedes & M. 15; *Stults v. Brown*, 112 Ind. 370, 2 Am. St. Rep. 190; and see *Burgess v. Wheate*, 1 W. Black. 150.

2 *Davis v. Heard*, 44 Miss. 50.

3 *Shirley v. Shirley*, 7 Blackf. 452; *Clark v. Jacobs*, 56 How. Pr. 519.

4 *Money v. Dorsey*, 7 Smedes & M. 15.

5 *Griffith v. Depew*, 3 A. K. Marsh. 179, 13 Am. Dec. 141; and see *Ware v. Curry*, 67 Ala. 274.

6 *Griffith v. Depew*, 3 A. K. Marsh. 179, 13 Am. Dec. 141.

7 *Lillie v. Case*, 54 Iowa, 177.

### § 396a. Breach of Contract—Vendor's Remedies.

In case of a breach of contract by the vendee, the vendor can either sue at law for damages, or

he may resort to equity for specific performance.<sup>1</sup> But he cannot sue in one court for specific performance and in another for damages for entire nonperformance. The two proceedings are inconsistent with one another, and the vendor will be compelled to elect between his remedies.<sup>2</sup> In an action at law for breach of the contract to purchase, the measure of damages is the difference between the contract price and the market value of the land at the time of the breach, less the amount already paid.<sup>3</sup>

1 *Smyth v. Sturges*, 108 N. Y. 495; *Hogan v. Kyle*, 7 Wash. 595, 38 Am. St. Rep. 910; *Allen v. Mohn*, 86 Mich. 328, 24 Am. St. Rep. 126.

2 *O'Keefe v. Irvington Co.*, 87 Md. 196.

3 *Muenchow v. Roberts*, 77 Wis. 520; *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257; *Hogan v. Kyle*, 7 Wash. 595, 38 Am. St. Rep. 910; *Allen v. Mohn*, 86 Mich. 328, 24 Am. St. Rep. 126. See sec. 402, post.

### § 397. Action for Purchase Money.

In an ordinary contract for the sale and purchase of lands containing mutual dependent covenants as to the payment of the purchase money and the conveyance of title, neither party can maintain any action upon it, either at law or in equity, against the other without averring and proving performance on his part, or a readiness and willingness to perform.<sup>1</sup> But where by the terms of the contract the purchase money is to be paid before the execution of the deed, it is no defense to a suit on a note given for the purchase

money that the deed had not been made or tendered.<sup>2</sup> In such case the covenants are independent, and an action may be maintained for the purchase money after the time specified for its payment without making or offering to make a deed.<sup>3</sup> The conveyance is not a condition precedent to the right to demand the money.<sup>4</sup> So if it be stipulated that the vendee is to pay a part of the purchase money at a time specified, and he fails to do so, a tender of conveyance by the vendor is not necessary before bringing an action to recover the sum.<sup>5</sup> If the vendor binds himself to make a deed when the vendee requires it, and after the whole of the purchase money falls due the vendee offers to pay it and demands a deed, the vendor cannot maintain an action for the money without having tendered a proper conveyance.<sup>6</sup> Where a vendor has agreed to make title upon payment, and the purchase money is payable in installments falling due at different times, he may sue for any of the installments after they are due except the last without offering to make a deed.<sup>7</sup> A vendor who retains the title as security for the purchase money, or his assignee of the debt, may sue for and collect the unpaid purchase money in an action at law without, in the first instance, resorting to an action to enforce the lien for the debt.<sup>8</sup>

1 Rector v. Price, 6 Ala. 321; Broughton v. Mitchell, 64 Ala. 210; Thomson v. Smith, 63 N. Y. 301; Kelly v. Mack, 45 Cal. 303; Perry v. Wheeler, 24 Vt. 286; Stingle v. Hawkins, 8 Blackf. 435; Eckford v. Halbert, 30

Miss. 273; O'Kare v. Kiser, 25 Ind. 168; Holloway v. Davis, Wright, 129; Sorrells v. McHenry, 38 Ark. 127. See sec. 385, ante.

2 Broughton v. Mitchell, 64 Ala. 210; Adams v. Wadhams, 40 Barb. 225; Davis v. Heady, 7 Blackf. 261; Paine v. Brown, 37 N. Y. 225; Gale v. Best, 20 Wis. 44.

3 Broughton v. Mitchell, 64 Ala. 210; Armfield v. Tate, 7 Ired. 258; Gibson v. Newman, 2 Miss. 341. The action by the vendor must be prompt, and consistent with the theory that the purchase money is his, and the land that of the alleged vendee: Scudder v. Wadtingham, 7 Mo. App. 26.

4 Bailey v. Clay, 4 Rand. 346.

5 Devling v. Little, 26 Pa. St. 502. But the time of payment may be rendered immaterial by the consent or acquiescence of the parties: Campbell v. Worthington, 6 Vt. 448.

6 Davidson v. Van Pelt, 15 Wis. 341. If the vendor stipulates in the contract of sale that the vendee is to have a right of way and other servitudes belonging to the land, he cannot enforce the payment of the price until he has complied with that obligation: Fortier v. Burthe, 19 La. Ann. 510.

7 Terry v. George, 37 Miss. 539; Sparta Bank v. Agnew, 45 Wis. 131, 64 Am. Dec. 535; Batty v. Beebe, 22 Kan. 81. Compare Beecher v. Conradt, 13 N. Y. 108, 64 Am. Dec. 535; Hook v. Nebeker, 1 Ind. 257; Reddish v. Smith, 10 Wash. 178, 45 Am. St. Rep. 781. A vendor under articles of agreement who, on failure of the vendee to pay the first installment due, recovers judgment against him, and on an execution becomes purchaser of the land at sheriff's sale, cannot afterward enforce the payment of the balance of the purchase money from the vendee or from his estate; Graff v. Kelly, 43 Pa. St. 453, 82 Am. Dec. 580.

8 Longmaid v. Coulter, 123 Cal. 208.

### § 398. Defenses to Action for Purchase Money.

It has frequently been held that want of title in the vendor is a good defense at law to an action on a bond or note given for the purchase money

of land.<sup>1</sup> And a failure of title in part has been usually held to constitute a pro tanto defense against payment of the purchase money.<sup>2</sup> The vendee may show that the vendor was not the owner of the land on the day when the deed was to be delivered and the note paid.<sup>3</sup> But it is held to be no defense to a note given for the purchase money, and payable before the time for the making of the deed, that the vendor has no title to the land.<sup>4</sup> So it is no defense that the vendor had no title, the vendee having had full knowledge of the title when he bought, unless there was fraud.<sup>5</sup> Nor can the vendee defend a suit on the note on the ground of a failure of title, and still retain the land and enjoy the profits.<sup>6</sup> So a vendee of land under a parol contract who has given his note for the purchase money, and been let into possession, cannot avoid its payment on the ground that the contract is void by the statute of frauds.<sup>7</sup> A parol contract for the sale of land is voidable merely, not absolutely void.<sup>8</sup> And, as a general rule, one who has gone into possession of land under a contract of sale cannot retain possession under the contract and yet avoid payment of the balance of the purchase money on the ground that the vendor cannot give him a good title as agreed.<sup>9</sup> To avail himself of such defense, the vendee must offer to rescind the contract;<sup>10</sup> and he cannot resist the plaintiff's right to recover on the ground of a failure of title as to a portion of the property, if he



has disabled himself from placing his vendor in statu quo by conveying the title to a third party.<sup>11</sup> But if the vendor has conveyed away his title without notice to the vendee, so as to be unable to fulfill his bond to convey, it is a good defense to an action for the purchase money.<sup>12</sup>

1 *Gorham v. Reeves*, 3 Ind. 83; *Lewis v. McMillen*, 31 Barb. 395; *Miles v. Stevens*, 3 Pa. St. 21, 45 Am. Dec. 621; *Myers v. Aikman*, 3 Ill. 452; *Wellman v. Dismukes*, 42 Mo. 101; *Knepper v. Kurtz*, 58 Pa. St. 480; *Combs v. Fisher*, 3 Bibb. 51; *Stiles v. Sherman*, 34 Me. 344.

2 *Wilkerson v. Chadd*, 14 Ind. 448; *White v. Lowry*, 27 Pa. St. 254; *Morgan v. Smith*, 11 Ill. 194; *Stiles v. Sherman*, 34 Me. 344; *Miller v. Tate*, 12 La. Ann. 160; *Barnes' Appeal*, 46 Pa. St. 350. In Maine, it is held to be no defense, either in whole or in part, to a note given for land conveyed by a warranty deed, that the title to the land has partially failed: *Morrison v. Jewell*, 34 Me. 146. See, also, *Wiley v. Howard*, 15 Ind. 169; *Glenn v. Thistle*, 23 Miss. 42; *Whitney v. Lewis*, 21 Wend. 131; *Picket v. Picket*, 6 Ohio St. 525; *Lamerson v. Marvin*, 8 Barb. 9; *Patton v. England*, 15 Ala. 69. In Alabama, in the absence of fraud, mistake, or warranty, defect or failure of title in the vendor is not available to the vendee to defeat or abate recovery for the purchase money of lands: *Tobin v. Bell*, 61 Ala. 125; and see *Greenleaf v. Cook*, 2 Wheat. 16; *Abbott v. Allen*, 2 Johns. Ch. 519, 7 Am. Dec. 554; *Trumbo v. Lockridge*, 4 Bush, 415; sec. 389a, ante.

3 *Gorham v. Reeves*, 3 Ind. 83; *Overly v. Tipton*, 68 Ind. 410.

4 *Harrington v. Higgins*, 17 Wend. 376; *Wiley v. Howard*, 15 Ind. 169; *Taylor v. Johnson*, 19 Tex. 351; *Reid v. Davis*, 4 Ala. 83.

5 *Pennock v. Claypole*, 1 Phila. 15; *Neel v. Prickett*, 12 Tex. 137; *Bryan v. Osborne*, 61 Ga. 51.

6 *McDaniel v. Bryan*, 8 Ill. App. 273; *La Forge v. Mathews*, 68 Ill. 328. And see *Delaney v. McDonald*, 47 Wis. 108; *Staley v. Ivory*, 65 Mo. 74.

7 Gillespie v. Battle, 15 Ala. 276; Byers v. Aiken, 5 Ark. 419; Holland v. Hoyt, 14 Mich. 238; McGowan v. West, 7 Mo. 569, 38 Am. Dec. 468; Curran v. Curran, 40 Ind. 473.

8 Curran v. Curran, 40 Ind. 473; Sawyer v. Ware, 36 Ala. 675. Compare Bates v. Terrell, 7 Ala. 129.

9 Taft v. Kessel, 16 Wis. 273; Helvenstein v. Hig-gason, 35 Ala. 259; Wiley v. Howard, 15 Ind. 169; Worthington v. Curd, 22 Ark. 277; Picket v. Picket, 6 Ohio St. 525; Timms v. Shannon, 19 Md. 296, 81 Am. Dec. 632; Wauser v. Messler, 29 N. J. L. 256; McIndoe v. Morman, 26 Wis. 588, 7 Am. Rep. 796. Compare Cross v. Noble, 67 Pa. St. 74; Negley v. Lindsay, 67 Pa. St. 217, 5 Am. Rep. 427.

10 Lynch v. Baxter, 4 Tex. 431, 51 Am. Dec. 735; Smith v. Bushy, 15 Mo. 387, 57 Am. Dec. 207; McIndoe v. Morman, 26 Wis. 588, 7 Am. Rep. 796. Compare Gans v. Renshaw, 2 Pa. St. 34, 44 Am. Dec. 152.

11 M'Keen v. Beaupland, 35 Pa. St. 488.

12 Banks v. Ammon, 27 Pa. St. 172; Chandler v. Marsh, 3 Vt. 161.

### § 399. Recovery Back of Purchase Money.

The cases in which a vendee may recover back money paid on a contract for the purchase of land are thus enumerated: 1. Where the rescission of the contract is voluntary, and by mutual consent; 2. Where the vendor is incapable or unwilling to perform the contract on his part; or 3. Where the vendor has been guilty of fraud in making the contract.<sup>1</sup> In either of these cases the law implies a promise on the part of the vendor to refund the money.<sup>2</sup> But if he has in all respects performed his contract, and the rescission is entirely in consequence of the unexpected default of the vendee in making further payments, it is held that the

latter cannot recover back the money paid by him.<sup>3</sup> One who is in the quiet possession of land under a contract of sale, and having paid the purchase money, cannot recover it back.<sup>4</sup> Before an action can be maintained therefor, the plaintiff must have been evicted, or have voluntarily surrendered or offered to surrender possession.<sup>5</sup> He cannot hold on to the property and at the same time recover back what he paid.<sup>6</sup> But after an offer by him to rescind the contract and to surrender possession, he may then recover what he has paid, with interest and the value of his improvements, less the value of his use and occupation.<sup>7</sup> It has generally been held that a party who advances money on an oral contract for the sale of land cannot recover it back if the other party is able and willing to fulfill the contract on his part.<sup>8</sup> But a different rule is adopted in Alabama, and it is there held that if the vendor in fact had no title, the purchaser may, so long as the contract is executory, whether it was verbal or written, repudiate it altogether, and recover back the money paid under it.<sup>9</sup> To warrant an action for money had and received for the recovery back of money paid under a special contract to convey land, it is held that as strict a performance must be shown by the plaintiff as if he had sued on the contract;<sup>10</sup> unless it has been either expressly rescinded or impliedly so, as by nothing having been done under it for a long time, or by

the defendant having acted inconsistently with it.<sup>11</sup> A void contract for the purchase of land need not be rescinded before action to recover the purchase money paid under the contract.<sup>12</sup> A purchaser of real property who makes a deposit of money under an agreement that it shall be forfeited if he fails to comply with the terms of the sale cannot recover it if the sale is not completed through his fault.<sup>13</sup> But a provision for forfeiture for the nonpayment of the purchase money at a certain time is held to be waived by the subsequent execution of a deed to the vendee or his assignee by the original vendor.<sup>14</sup> When the vendee is entitled to recover the purchase money already paid, upon rescission of the contract of sale, no demand prior to suit is necessary.<sup>15</sup>

1 Welles, J., in *Battle v. Rochester City Bank*, 5 Barb. 414. Compare *Baston v. Clifford*, 68 Ill. 67, 18 Am. Rep. 547; *Bryson v. Crawford*, 68 Ill. 362; *McIndoe v. Morman*, 26 Wis. 588, 7 Am. Rep. 96; *Newsome v. Graham*, 10 Barn. & C. 234; *Lyon v. Annable*, 4 Conn. 350; *Kerr v. Kitchen*, 7 Pa. St. 486; *Force v. Dutcher*, 18 N. J. Eq. 401; *Pipkin v. James*, 1 Humph. 325, 34 Am. Dec. 652; *Wilhelm v. Fimple*, 31 Iowa, 131, 7 Am. Rep. 117; *Wheeler v. Mather*, 56 Ill. 241, 8 Am. Rep. 682; *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123.

2 *Abbott v. Draper*, 4 Denio, 51; *Tice v. Zinsser*, 76 N. Y. 549; *Pressnell v. Lundin*, 44 Minn. 551; *Beaman v. Simmons*, 76 N. C. 43. When the title partially fails, the vendee may recover back a proportional share of the purchase money paid: *Michael v. Mills*, 17 Ohio, 601. And see *Timby v. Kinsey*, 18 Hun, 255. A vendee in an executory contract for the sale of lands cannot recover a portion of the purchase money paid by him, where the buildings on the land have been destroyed by

fire without the vendor's fault, after such payment and the payment of the balance, where it does not appear that the buildings formed the chief inducement to the purchase: *Bautz v. Kuhworth*, 1 Mont. 133, 25 Am. Rep. 737. But the vendee in such case is not bound to take the lands and pay the notes given for the purchase money, though the vendor is entitled to the value of the use and occupancy during the vendee's possession: *Gould v. Murch*, 70 Me. 288, 35 Am. Rep. 325. Compare *Wells v. Calnan*, 107 Mass. 514, 9 Am. Rep. 65.

3 *Battle v. Rochester City Bank*, 5 Barb. 414; *Frederick v. Birkett*, 37 Kan. 536; and see *Page v. McDonnell*, 55 N. Y. 299; 46 How. Pr. 299; *Haynes v. Hart*, 42 Barb. 58; *Easton v. Montgomery*, 90 Cal. 307, 25 Am. St. Rep. 123.

4 *Cope v. Williams*, 4 Ala. 362; *McIndoe v. Morman*, 26 Wis. 588, 7 Am. Rep. 96; *Long v. Saunders*, 88 Ill. 147; and see *Waddell v. Latham*, 71 Miss. 351, 42 Am. St. Rep. 467. But this rule applies only to a valid contract of sale, and not to a contract void for want of consent, and entered into in error produced by the fraud of the opposite party: *Formento v. Robert*, 27 La. Ann. 489.

5 *Haynes v. White*, 55 Cal. 38; *Rhorer v. Bila*, 83 Cal. 55; *Jones v. Noe*, 71 Ind. 368. But compare *Johnston v. Powell*, 34 Tex. 528.

6 *Long v. Saunders*, 88 Ill. 147; *Purdy v. Bullard*, 41 Cal. 444; *Summerall v. Graham*, 62 Ga. 729.

7 *McIndoe v. Morman*, 26 Wis. 588, 7 Am. Rep. 96; *Pino v. Beckwith*, 1 N. Mex. 19; *Witherspoon v. M'Calla*, 3 Desaus. Eq. 245; *Bryant v. Boothe*, 30 Ala. 311, 68 Am. Dec. 117; *Simpson v. Belvin*, 37 Tex. 674; *McDonald v. Beall*, 55 Ga. 288. Compare *White v. Tucker*, 52 Miss. 145.

8 *Gammon v. Butler*, 48 Me. 344; *Plummer v. Breckman*, 55 Me. 105; *Venable v. Brown*, 31 Ark. 564; *Coughlin v. Knowles*, 7 Met. 57, 39 Am. Dec. 759; *Galvin v. Prentice*, 45 N. Y. 162, 6 Am. Rep. 58; *Galway v. Shields*, 66 Mo. 313, 27 Am. Rep. 351; *Wetherbee v. Potter*, 99 Mass. 354; *McKinney v. Harvie*, 38 Minn. 18, 8 Am. St. Rep. 640. See *Thomas v. Brown*, L. R. 1 Q. B. Div. 714.

9 Flinn v. Barber, 64 Ala. 193; Nelson v. Improvement Co., 96 Ala. 515, 38 Am. St. Rep. 116.

10 Green v. Green, 9 Cowl. 46; and see Hartley v. James, 50 N. Y. 38; Page v. McDonnell, 55 N. Y. 303, 304; Bellows v. Cheek, 20 Ark. 424; and see Wright v. Dickinson, 67 Mich. 580, 11 Am. St. Rep. 602; McKinnon v. Vollmar, 75 Wis. 82, 17 Am. St. Rep. 178; Moore v. Williams, 115 N. Y. 586, 12 Am. St. Rep. 844.

11 Green v. Green, 9 Cow. 46. Where one has been induced by fraud to enter into a contract for the purchase of land, he may sue to recover back his money without giving notice of his intent to rescind, nothing having been done under the contract except the payment of the money sued for: Herbert v. Stanford, 12 Ind. 503. See Camp v. Pulver, 5 Barb. 91.

12 Wright v. Dickinson, 67 Mich. 580, 11 Am. St. Rep. 602.

13 Thompson v. Kelly, 101 Mass. 299, 3 Am. Rep. 353; Donahue v. Parkman, 161 Mass. 412, 42 Am. St. Rep. 415.

14 Alexander v. Jackson, 92 Cal. 514, 27 Am. St. Rep. 158.

15 Chatfield v. Williams, 85 Cal. 518; Jensen v. Weide, 42 Minn. 59; Drew v. Pedlar, 87 Cal. 443, 22 Am. St. Rep. 257; and so, to same effect, Thomas v. Pacific etc. Co., 115 Cal. 141.

## § 400. Action for Use and Occupation.

Many of the authorities favor the position that one who is let into the possession of land under a contract to purchase is strictly a tenant at will.<sup>1</sup> And it has been further held that where one enters into such a contract, which is abandoned by him, if his occupation has been beneficial, he will be liable in an action for use and occupation;<sup>2</sup> or the vendor may, at his election, either treat him as a tenant, and recover for use and occupation, or as a trespasser, and eject him by suit.<sup>3</sup> On

the other hand, it was held that where there is a contract for the purchase of land, under which the purchaser enters into possession, but afterward refuses to complete the purchase, the vendor cannot maintain an action of assumpsit against him for use and occupation;<sup>4</sup> but he must resort to an action of trespass and ejectment to recover the mesne profits.<sup>5</sup> And according to many recent decisions, the relation of landlord and tenant does not exist between vendor and vendee where the vendee enters into possession under an executory contract of purchase, and makes default in the payment of the purchase money;<sup>6</sup> nor does such default entitle the vendor to elect a rescission of the contract, and treat the vendee as a tenant liable for rent.<sup>7</sup> But in such case he has three remedies, all of which he may pursue at the same time; namely, he may maintain ejectment on his legal title, sue at law for the recovery of the purchase money, and proceed in equity for the enforcement of his lien.<sup>8</sup> The legal consequences of a voluntary rescission of a contract for the sale of land is to restore the parties, as far as practicable, to the position they would have occupied if no contract had been entered into.<sup>9</sup> The vendee, having been in possession, is entitled to a return of the purchase money, and the vendor to a fair rental for the use and occupation of the land, less the value of the permanent improvements placed thereon by the vendee.<sup>10</sup> It is held to be settled

law in Virginia that a party in possession under a parol contract to purchase land is a tenant at will, and cannot be ejected by his grantor or by the latter's grantee, without demand for possession, or notice and refusal to surrender, or some other wrongful act by him to determine such possession.<sup>11</sup>

1 *Right v. Beard*, 13 East, 210; *Waring v. King*, 8 Mees. & W. 571; *Howard v. Shaw*, 8 Mees. & W. 118; and see secs. 96, 121, ante. A vendee under a parol contract of purchase, who enters upon land with the permission of the vendor, and under an agreement that he may occupy and work it until the vendor is prepared to convey, is a tenant at will, and as such is entitled to the emblements: *Harris v. Frink*, 49 N. Y. 24, 10 Am. Rep. 318; and see *Patterson v. Stoddard*, 47 Me. 355, 74 Am. Dec. 490.

2 *Hearn v. Tomlin*, Peake, 192; *Davidson v. Ernest*, 7 Ala. 817; *Howard v. Shaw*, 8 Mees. & W. 118; and see *Knowles v. Shapleigh*, 8 Cush. 336; *Wright v. Roberts*, 22 Wis. 161; *Smith v. Wooding*, 20 Ala. 324; *Rider v. Union India Rubber Co.*, 28 N. Y. 379.

3 *Seabury v. Stewart*, 22 Ala. 207, 58 Am. Dec. 254; *Hicks v. Lovell*, 64 Cal. 14, 49 Am. Rep. 679; *Gates v. McLean*, 70 Cal. 50.

4 *Smith v. Stewart*, 6 Johns. 46, 5 Am. Dec. 186; *Dixon v. Haley*, 16 Ill. 145; *Miles v. Elkin*, 10 Ind. 329; *Stacy v. Vermont etc. R. R. Co.*, 32 Vt. 551; *Kyle v. Kyle*, 3 Hun, 460; *Greenup v. Vernor*, 16 Ill. 26; *Rogers v. Wiggs*, 12 B. Mon. 504; *Kirtland v. Pounsett*, 2 Taunt. 145; *Winterbottom v. Ingham*, 7 Q. B. 611.

5 *Smith v. Stewart*, 6 Johns. 46, 5 Am. Dec. 186; *McNair v. Schwartz*, 16 Ill. 24; *Thompson v. Bower*, 60 Barb. 477.

6 *Thompson v. Bower*, 60 Barb. 477; *Kyle v. Kyle*, 3 Hun, 460; *Tucker v. Adams*, 52 Ala. 254; *Brewer v. Craig*, 18 N. J. L. 214; and see *Moore v. Harvey*, 50 Vt. 297; *Dennett v. Penobscot Fair Ground Co.*, 57 Me. 425, 2 Am. Rep. 58. Nor can a tenancy be implied from the



circumstance of a vendor remaining in possession of premises after a sale so as to enable the vendee to maintain an action for use and occupation: *Greenup v. Vernon*, 16 Ill. 26.

7 *Tucker v. Adams*, 52 Ala. 254.

8 *Doe v. McLoskey*, 1 Ala. 708; *Tucker v. Adams*, 52 Ala. 254; and see sec. 394, ante.

9 *Smith v. Stewart*, 83 N. C. 406.

10 *Smith v. Stewart*, 83 N. C. 406; and see *Patrick v. Roach*, 21 Tex. 251. So where a vendee succeeds in obtaining the rescission of a contract on the ground of fraud, he is chargeable with the rent of the land during the time he held possession of it, and is entitled to a credit for valuable and permanent improvements erected thereon by him: *Thompson v. Lee*, 31 Ala. 292; and see *Wood v. Krebbs*, 33 Gratt. 685; *McCarty v. Moorer*, 50 Tex. 287; *Jones v. Hutchinson*, 21 Tex. 370; *Coffman v. Huck*, 19 Mo. 435. But when a party obtains the title and possession of land by fraudulent representations, he should be treated as having entered with full knowledge that his entry was without right; he should be charged with rents, and should not be allowed for meliorations or improvements made by him: *Moseley v. Miller*, 13 Bush, 408.

11 *Twyman v. Hawley*, 24 Gratt. 512, 18 Am. Rep. 661; *Jones v. Temple*, 87 Va. 210, 24 Am. St. Rep. 649; and see, to same effect, *Hall v. Wallace*, 88 Cal. 434; *Knight v. Hartman*, 81 Mich. 462.

## § 401. Damages for Failure to Convey.

The general rule which prevails in England and in this country is that, if the contract for the sale of land was made in good faith, and the vendor for any reason is unable to perform it and is guilty of no fraud, the vendee is limited in his recovery to the purchase money and interest;<sup>1</sup> with, perhaps, in addition, the costs of investigating the title.<sup>2</sup> On a covenant to convey, as on a covenant

of seisin, the measure of damages is, in the absence of fraud, the purchase money and interest;<sup>3</sup> and the purchaser is entitled to no satisfaction for the loss of his bargain.<sup>4</sup> In cases where no part of the purchase money has been paid, he can recover only nominal damages.<sup>5</sup> But if the vendor is guilty of fraud, or can convey but will not, or if he has covenanted to convey when he knew he had no authority to contract to convey, or refuses to remedy a defect in his title which is in his power to do, or refuses to incur expenses which would enable him to fulfill his contract—in all these cases he is liable to the vendee for the loss of the bargain;<sup>6</sup> the proper measure of damages is the value of the land at the time of the breach.<sup>7</sup> So the general rule adopted in some of the states is, that where a vendor contracts to sell lands for a stipulated price at a certain time, and upon the arrival of the appointed time is for any reason unable to convey, in an action by the vendee to recover for a breach of the contract the true measure of damages is the value of the land at the time the conveyance was to be made.<sup>8</sup> And this rule applies in case of an agreement to exchange lands, and one of the parties knew at the time that he had no title to the land which he agreed to convey,<sup>9</sup> or, having title, refused to convey in pursuance of the bargain of exchange.<sup>10</sup> In Pennsylvania, the measure of damages for the breach of a parol contract to convey land, in the absence of

fraud, is the consideration and compensation for improvements in reliance on the contract, deducting a reasonable rental of the premises.<sup>11</sup> The right of action accrues when the vendor conveys to a stranger;<sup>12</sup> but in order to recover damages for the breach of a parol contract to convey land, the evidence of the contract must be clear, satisfactory, and unambiguous.<sup>13</sup> And compensation for breach of contract to convey will, in general, be denied where the party asking it had notice at the time the contract was made that the vendor was agreeing for more than he could give or convey, and it appears that the vendee has not, in consequence of the contract, placed himself in a situation from which he cannot extricate himself without loss.<sup>14</sup> So a vendor in good faith, believing he has title, covenanting to convey land, and discovering, before any part of the consideration money is paid, a defect in his title, is not liable to damages for a refusal to convey.<sup>15</sup> Under Nebraska law, if the vendor cannot make title, the vendee may at his election recover payments of purchase money with interest, or damages for the loss of his bargain.<sup>16</sup>

1 *Flureau v. Thornhill*, 2 W. Black. 1078; *Bain v. Fothergill*, L. R. 6 Ex. 59; affirmed, L. R. 7 Eng. & Ir. App. 158; *Walker v. Moore*, 10 Barn. & C. 416; *Engel v. Fitch*, L. R. 3 Q. B. 314; *Hall v. Delaplaine*, 5 Wis. 206, 68 Am. Dec. 57; *Thompson v. Guthrie*, 9 Leigh, 101. 33 Am. Dec. 225; *Kelly v. Bradford*, 3 Bibb, 317, 6 Am. Dec. 656; *Blackwell v. Lawrence Co.*, 2 Blackf. 143; *Bush v. Cole*, 28 N. Y. 261; *Mack v. Patchin*, 42 N. Y.

167, 1 Am. Rep. 506; *Pumpelly v. Phelps*, 40 N. Y. 59, 100 Am. Dec. 463; *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490; *Thompson v. Sheplar*, 72 Pa. St. 160.

2 *Hammond v. Hannin*, 21 Mich. 374, 4 Am. Rep. 490. Where a vendor fails to make a good title within the time agreed, and the vendee dies, his executor may sue for damage incurred by loss of interest on the deposit money, and the expense of investigating the title: *Orme v. Broughton*, 10 Bing. 533.

3 *Herndon v. Venable*, 7 Dana, 371; *Dunnica v. Sharp*, 7 Mo. 71; *Stewart v. Noble*, 1 Greene, 26; and see sec. 318, ante.

4 *Flureau v. Thornhill*, 2 W. Black. 1078; *Bain v. Fothergill*, L. R. 6 Ex. 59; affirmed, L. R. 7 Eng. & Ir. App. 158; *Drake v. Baker*, 34 N. J. L. 358.

5 *Mack v. Patchin*, 42 N. Y. 167, 1 Am. Rep. 506; *Conger v. Weaver*, 20 N. Y. 140; *Cockcroft v. New York etc. R. R. Co.*, 69 N. Y. 201. But compare *Muenchow v. Roberts*, 77 Wis. 520.

6 *Bitner v. Brough*, 11 Pa. St. 127; *Hopkins v. Grazebrook*, 6 Barn. & C. 31; *Davis v. Lewis*, 4 Bibb, 456; *Trull v. Granger*, 8 N. Y. 115; *Stanton v. Miller*, 14 Hun, 383; *Burr v. Todd*, 41 Pa. St. 206; *Martin v. Wright*, 21 Ga. 504; *Lock v. Furze*, L. R. 1 Com. P. 441; *Engel v. Fitch*, L. R. 3 Q. B. 314; *Pumpelly v. Phelps*, 40 N. Y. 60, 100 Am. Dec. 463; *Robinson v. Harman*, 1 Ex. 849. In a recent English case, it is held that if a person enters into a contract for the sale of land, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot, in an action for breach of the contract, recover damages beyond the expenses he has incurred. Any other damages must be the subject of an action for deceit: *Bain v. Fothergill*, L. R. 6 Ex. 59; affirmed, L. R. 7 Eng. & Ir. App. 158; overruling *Hopkins v. Grazebrook*, 6 Barn. & C. 31.

7 *McConnell v. Dunlap*, Hardin, 41, 3 Am. Dec. 723; *Driggs v. Dwight*, 17 Wend. 71, 31 Am. Dec. 283; *Cox v. Henry*, 32 Pa. St. 18; *Drake v. Baker*, 34 N. J. L. 358.

8 *M'Kee v. Brandon*, 3 Ill. 339; *Plummer v. Rigdon*, 78 Ill. 222, 20 Am. Rep. 261; *Warren v. Wheeler*, 21 Me. 484; *Doherty v. Dolan*, 65 Me. 87, 20 Am. Rep. 677;

Kirkpatrick v. Downing, 58 Mo. 32, 17 Am. Rep. 678; Barnham v. Nichols, 3 R. I. 187; Boardman v. Keeler, 21 Vt. 84; Wells v. Abernethy, 5 Conn. 222; Hopkins v. Lee, 6 Wheat. 109.

9 Plummer v. Rigdon, 78 Ill. 222, 20 Am. Rep. 261.

10 Burr v. Todd, 41 Pa. St. 206. Compare Fagen v. Davison, 2 Duer, 153; Devin v. Himer, 29 Iowa, 296. When it is proved that the premises to be conveyed by the plaintiff were of less value than those to be conveyed to him by the defendant, this difference of value, together with the expense of examining the title, is the true measure of damages: *Id.*; and see Baker v. Scott, 2 Thomp. & C. 607; Thomas v. Dickinson, 12 N. Y. 364.

11 Bender v. Bender, 37 Pa. St. 419. Compare Hertzog v. Hertzog, 34 Pa. St. 418; Meason v. Kaine, 63 Pa. St. 335; 67 Pa. St. 126; Malaun v. Ammon, 1 Grant Cas. 123; Harris v. Harris, 70 Pa. St. 170. That the vendee may maintain an action for compensation for his trouble, loss of time, expense, etc., incurred upon the faith that the contract would be consummated, in case the vendor refuses to complete the sale according to the parol agreement, see Welch v. Lawson, 32 Miss. 170, 66 Am. Dec. 606.

12 Thurston v. Franklin College, 16 Pa. St. 154; and see Wilson v. Spencer, 11 Leigh, 261. But if the vendee puts it out of the power of the vendor to fulfill the contract, no action lies for the recovery of damages for not conveying: Gibson v. Dunnam, 1 Hill (S. C.), 289, 26 Am. Dec. 180.

13 Poorman v. Kilgore, 37 Pa. St. 309.

14 Peeler v. Levy, 26 N. J. Eq. 330; Wiswall v. McGown, 1 Hoff. Ch. 131; Harnett v. Yeilding, 2 Schoales & L. 559.

15 Baldwin v. Munn, 2 Wend. 399.

16 Seaver v. Hall, 50 Neb. 878; 52 Neb. 316. But compare Violet v. Rose, 39 Neb. 660.

## § 402. Damages for Failure to Accept Conveyance.

On an executory contract for the sale of real property the vendor cannot recover of the pur-

chaser in default the full contract price, except in an action for specific performance.<sup>1</sup> If the purchaser refuses to accept the deed and pay for the land, and the vendor brings his action at law on the contract, he is entitled to recover such damages only as shall compensate him for the loss of the bargain.<sup>2</sup> In other words, the measure of damages is held to be the difference between the price agreed to be paid for the land and its real value at the time the contract was broken.<sup>3</sup> But it is immaterial whether the plaintiff in such an action keeps or sells the land, and if he sells it, he is not bound to obtain the defendant's consent to the sale, or to consult him in relation thereto.<sup>4</sup> In case of a sale at auction, and a breach of the contract by the vendee, the difference between the price at which the land is first bid off and the price for which it sold at a subsequent and second sale affords a good criterion of damages, though this mode of estimation is not binding upon the jury.<sup>5</sup> Contrary to the general rule above stated as to the measure of damages where the vendee refuses to perform, it has been held that the vendor is entitled to recover the full purchase price and interest;<sup>6</sup> and that the vendee cannot limit him to the actual damages sustained by reason of the breach.<sup>7</sup>

1 *Congregation Beth Elohim v. Central Presbyterian Church*, 10 Abb. Pr., N. S., 484; *Porter v. Travis*, 40 Ind. 556. A vendor may, by an action for the specific performance of a contract against the vendee, compel the

acceptance of the conveyance of the land sold, and the payment of the purchase money: *Id.*

2 *Laird v. Pim*, 7 Mees. & W. 474; *Congregation Beth Elohim v. Central Presbyterian Church*, 10 Abb. Pr., N. S., 484.

3 *Laird v. Pim*, 7 Mees. & W. 474; *Griswold v. Sabin*, 51 N. H. 167; *Porter v. Travis*, 40 Ind. 556; *Old Colony R. R. Co. v. Evans*, 8 Gray, 25; *Sawyer v. McIntyre*, 18 Vt. 27; and see *Eva v. McMahon*, 77 Cal. 467; *Drew v. Pedlar*, 87 Cal. 443, 22 Am. St. Rep. 257; *Allen v. Mohn*, 86 Mich. 328, 24 Am. St. Rep. 126.

4 *Griswold v. Sabin*, 51 N. H. 167, 12 Am. Rep. 76; and see *Baney v. Killmer*, 1 Pa. St. 30, 44 Am. Dec. 109.

5 *Adams v. McMillan*, 7 Port. 73. Compare *Alna v. Plummer*, 4 Me. 258.

6 *Richards v. Edick*, 17 Barb. 260; *Oatman v. Walker*, 3 Me. 67; and see *Robinson v. Heard*, 15 Me. 296.

7 *Lawrence v. Miller*, 86 N. Y. 131. The vendee in a contract for the sale of land, having made default, cannot recover back any part of the sum paid by him on the contract: *Lawrence v. Miller*, 86 N. Y. 131. Where one conveys lands to another under a parol agreement not to be performed within one year, and so void under the statute of frauds, if after a partial performance the grantee repudiates the agreement, the grantor can recover the value of the lands, deducting therefrom the value of the partial performance: *Day v. New York Cent. R. R. Co.*, 51 N. Y. 583; *Day v. New York Cent. R. R. Co.*, 22 Hun, 412.

### § 403. Liquidated Damages, and Penalty.

Parties to a contract for the purchase and sale of land, as in other contracts, may adjust in advance the damages to result from a breach of the agreement, and may prescribe in the agreement itself what shall be the damages which he who violates the contract shall pay to the other.<sup>1</sup> Damages thus mutually adjusted or agreed upon by the parties in advance are termed liquidated

or stipulated damages;<sup>2</sup> and it is held that where an agreement declares that the party in default shall pay to the other party a given sum as "liquidated damages," such sum, *prima facie*, is to be treated as damages, and not as a penalty.<sup>3</sup> The use of the term "penalty," or "liquidated damages," is not, however, conclusive to show the true character of the sum agreed to be paid in the event of nonperformance.<sup>4</sup> The court must in each case gather from the whole instrument what was the real intention of the parties;<sup>5</sup> and will refuse to hold itself bound by the mere use of the term "liquidated damages," but will look to what must be considered in reason to have been intended by the parties in relation to the subject matter.<sup>6</sup> If, however, it be manifest that the parties meant the sum fixed to be liquidated damages, the court will not interfere to frustrate that intention.<sup>7</sup> While, on the other hand, if it be doubtful upon the whole agreement whether the sum named was intended to be a penalty or liquidated damages, it will be construed to be a penalty;<sup>8</sup> it being the tendency of the courts to consider the contract as creating a penalty to cover the damages actually sustained by a breach, rather than liquidated damages.<sup>9</sup> Nor will a covenant to pay heavy liquidated damages be extended by implication.<sup>10</sup> In general, a sum of money in gross, to be paid for the nonperformance of an agreement,<sup>11</sup> or to secure the prompt per-



formance thereof,<sup>12</sup> is considered a penalty, and not liquidated damages,<sup>13</sup> and more especially when it is expressly reserved as a penalty.<sup>14</sup> So, as a general rule, if the agreement contains disconnected stipulations of various degrees of importance, the sum named will be considered as a penalty though it is called liquidated damages, unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined.<sup>15</sup> So if the instrument provides that a larger sum shall be paid, on the failure of the party to pay a less sum in the manner prescribed, the larger sum is a penalty, whatever may be the language used in describing it.<sup>16</sup> So, as a general rule, if the agreement is not under seal, and the damages are capable of being definitely ascertained, the sum fixed upon as damages in case of violation will be deemed a penalty, though stated to be liquidated damages.<sup>17</sup> But if the damages be necessarily incapable of estimation, and the sum fixed be evidently intended as a compensation for a total failure to perform, it will be treated as liquidated damages, and not as a penalty.<sup>18</sup> The uncertainty as to the extent of the injury is said to be a criterion by which to determine whether it is a penalty or intended as liquidated damages.<sup>19</sup>

1 See *Williams v. Vance*, 9 S. C. 374, 30 Am. Rep. 26; *Holmes v. Holmes*, 12 Barb. 137; *Orr v. Churchill*, 1 H. Black. 232; *Astley v. Weldon*, 2 Bos. & P. 346; *Pearson v. Williams*, 24 Wend. 246; 26 Wend. 630.

2 *Dakin v. Williams*, 17 Wend. 447; 22 Wend. 201; *Lynde v. Thompson*, 2 Allen, 456; *Boys v. Ancell*, 5 Bing. N. C. 390; 7 Scott, 364. Cases of liquidated damages properly occur when the parties have agreed that, in case one party shall do a stipulated act, or omit to do it, the other party shall receive a certain sum as the just, appropriate, and conventional amount of the damages sustained by such act or omission: *Gillis v. Hall*, 7 Phila. 425; 2 Brewst. 342.

3 *Esmond v. Van Benschoten*, 12 Barb. 366. Compare *Dakin v. Williams*, 17 Wend. 447; 22 Wend. 201; *Williams v. Vance*, 9 S. C. 344, 374, 30 Am. Rep. 26; *Tayloe v. Sandiford*, 7 Wheat. 13; *Dunlop v. Gregory*, 10 N. Y. 241, 61 Am. Dec. 746.

4 *Magee v. Lavell*, L. R. 9 Com. P. 115; *Watts v. Sheppard*, 2 Ala. 425; *Hoagland v. Segur*, 38 N. J. L. 236; *Davis v. Freeman*, 10 Mich. 188; *Dimech v. Corlett*, 12 Moore P. C. C. 199; *Davies v. Penton*, 6 Barn. & C. 216, 224; *Schrimpf v. Manufacturing Co.*, 86 Tenn. 219, 6 Am. St. Rep. 832; *Condon v. Kemper*, 47 Kan. 126.

5 *Lea v. Whitaker*, L. R. 8 Com. P. 70; *Chase v. Allen*, 13 Gray, 42; *Shute v. Hamilton*, 3 Daly, 462; *Whitfield v. Levy*, 35 N. J. L. 145; *Noyes v. Phillips*, 60 N. Y. 408; *Hamaker v. Schroers*, 49 Mo. 406; *Kemp v. Knickerbocker Ice Co.*, 69 N. Y. 45; *Jaqueth v. Hudson*, 5 Mich. 123.

6 *Magee v. Lavell*, L. R. 9 Com. P. 115; *Scofield v. Tompkins*, 95 Ill. 190, 35 Am. Rep. 160; *Chamberlain v. Bagley*, 11 N. H. 234; *Gowen v. Garrish*, 15 Me. 273; *Basyl v. Ambrose*, 28 Mo. 39; *Mathews v. Sharp*, 99 Pa. St. 560; *Essex v. Daniell*, L. R. 10 Com. P. 538; *Lansing v. Dodd*, 45 N. J. L. 525; *Wilhelm v. Eaves*, 21 Or. 194.

7 *Lea v. Whitaker*, L. R. 8 Com. P. 70; *Williams v. Vance*, 9 S. C. 344, 374, 30 Am. Rep. 26; *Bagley v. Peddie*, 5 Sand. 192; *Bearden v. Smith*, 11 Rich. 550; *Crisdee v. Bolton*, 3 Car. & P. 240; *Dwinell v. Brown*, 54 Me. 460.

8 *Crisdee v. Bolton*, 3 Car. & P. 240; *Chaddick v. Marsh*, 21 N. J. L. 463.

9 *Tayloe v. Sandiford*, 7 Wheat. 13; *Baird v. Tolliver*, 6 Humph. 186, 44 Am. Dec. 298; *Wallis v. Carpen-*

ter, 13 Allen, 19; Spencer v. Tilden, 5 Cow. 150; and see Shreve v. Brereton, 51 Pa. St. 175; Ricketson v. Richardson, 19 Cal. 330; Colwell v. Lawrence, 38 N. Y. 71; Myer v. Hurt, 40 Mich. 517, 29 Am. Rep. 553; Scofield v. Tompkins, 95 Ill. 190, 35 Am. Rep. 160.

10 Leggett v. Mutual Life Ins. Co., 53 N. Y. 394.

11 Tayloe v. Sandiford, 7 Wheat. 13.

12 Scofield v. Tompkins, 95 Ill. 190, 35 Am. Rep. 160.

13 Scofield v. Tompkins, 95 Ill. 190, 35 Am. Rep. 160; Tayloe v. Sandiford, 7 Wheat. 13; In re Dagenham Dock Co., L. R. 8 Ch. 1022.

14 Tayloe v. Sandiford, 7 Wheat. 13; Richards v. Edick, 17 Barb. 260; Dennis v. Cumming, 3 Johns. Cas. 297, 2 Am. Dec. 160; Brown v. Bellows, 4 Pick. 179.

15 Hoagland v. Segur, 38 N. J. L. 230; and see Magee v. Lavell, L. R. 9 Com. P. 115; Dailey v. Litchfield, 10 Mich. 29; Nash v. Hermosilla, 9 Cal. 584, 70 Am. Dec. 676; Berry v. Wisdom, 3 Ohio St. 241.

16 Bagley v. Peddie, 5 Sand. 192; Haldeman v. Jennings, 14 Ark. 329; Mason v. Flint, 2 Minn. 350, 72 Am. Dec. 102; Cairnes v. Knight, 17 Ohio St. 69; Davis v. Hendrie, 1 Mont. 499.

17 Graham v. Bickham, 2 Yeates, 32; 4 Dall. 149; Pinkerton v. Caslon, 2 Barn. & Ald. 704; Spencer v. Tilden, 5 Cow. 144, 150, note; Gillis v. Hall, 7 Phila. 422; 2 Brewst. 342.

18 Fox v. Snyder, 9 Phila. 285; Wolf Creek Diamond Coal Co. v. Schultz, 71 Pa. St. 180; and see Clement v. Cash, 21 N. Y. 253; Staples v. Parker, 41 Barb. 648; Streeper v. Williams, 48 Pa. St. 450; Lange v. Week, 2 Ohio St. 519, 535; Bright v. Rowland, 4 Miss. 398.

19 Powell v. Burroughs, 54 Pa. St. 329.

#### § 404. Costs.

The rule that prevails universally at law is, that the costs shall abide the event of the action by the vendor or vendee.<sup>1</sup> So upon a suit in equity, prima facie, the prevailing party is entitled to costs, and the party who fails is liable

therefor.<sup>2</sup> But costs do not always follow a decree in favor of a party, but are to be awarded or refused in the sound discretion of the court, according to the justice of each particular case.<sup>3</sup> A party who depends upon circumstances to govern the discretion of the court in withholding costs must, however, show the existence of those circumstances in a sufficient degree to do away with the *prima facie* claim of costs.<sup>4</sup> Costs will not be awarded to either party where both are in fault;<sup>5</sup> or are equally innocent;<sup>6</sup> or in proceedings in the nature of amicable suits;<sup>7</sup> or where the practice on the subject is new and unsettled.<sup>8</sup> A purchaser has a right to require a marketable title;<sup>9</sup> and if brought into court upon a doubtful title, he ought to be discharged with costs.<sup>10</sup> And, in general, where the purchaser makes a fair objection to the title, although he fails in the objection, no costs should be allowed to the vendor;<sup>11</sup> otherwise, if the objections are frivolous, and specific performance is decreed in favor of the vendor.<sup>12</sup> It is a general rule that the vendee, if successful in a suit for specific performance, is entitled also to costs;<sup>13</sup> but not unless he has made a demand of performance, and has tendered the purchase money before bringing the suit.<sup>14</sup> A vendor who brings suit for a specific performance, but fails to deliver an abstract of his title, will not be allowed costs although he succeeds in the suit;<sup>15</sup> and so if the abstract de-

livered be insufficient.<sup>16</sup> The heirs of a party in an action for specific performance, it appearing that there was no improper behavior or unjustifiable defense, should not be charged with costs.<sup>17</sup> So a case between husband and wife is held not to be a case for costs.<sup>18</sup> And where a suit for specific performance is rendered necessary by the mere act of God, as where a vendor dies intestate or becomes a lunatic, the decree is generally made without costs to either side.<sup>19</sup> Where a purchaser obtains a bargain at an inadequate price, although the court may be bound to enforce it, yet it will do so without costs against the vendor whose estate the purchaser obtained at an under-value.<sup>20</sup> And if the purchaser's bill is dismissed because of his dishonorable conduct in the transaction, costs will be awarded against him.<sup>21</sup> And where a bill was filed by a vendor for specific performance, and the vendee claimed that the contract had been abandoned—failing in this defense, he was ordered to pay the costs of the suit up to the hearing.<sup>22</sup> So if there was an objection to the title not disclosed in the contract, but waived by the purchaser, he would be charged with the costs if he resisted a specific performance upon the objection so waived.<sup>23</sup> And where a vendor's bill for specific performance is dismissed with costs for want of a sufficient title, yet if the vendee, as a defense, has set up fraud and misrepresentation, which are disproved, he will

be liable for the costs occasioned by that defense.<sup>24</sup>

1 See *White v. Walker*, 5 Fla. 478, 503; *Hunter v. Marlboro*, 2 Wood. & M. 168; *Clark v. Reed*, 11 Pick. 449; *McReynolds v. Cates*, 7 Humph. 29.

2 *Decker v. Casley*, 2 N. J. Eq. 446; *Gray v. Gray*, 15 Ala. 779; *Thrall v. Chittenden*, 31 Vt. 183; *Saunders v. Frost*, 5 Pick. 259; *Stone v. Locke*, 48 Me. 425; *Lee v. Prindle*, 11 Gill & J. 288; *Ward v. Davidson*, 2 J. J. Marsh. 443; *Van Couver v. Bliss*, 11 Ves. 458; *Hampson v. Brandwood*, 1 Madd. 394; *Hunn v. Norton*, 1 Hopk. Ch. 344.

3 *Cowles v. Whitman*, 10 Conn. 121, 25 Am. Dec. 60; *Travis v. Waters*, 12 Johns. 300; *Brooks v. Byam*, 2 Story, 554; *Van Couver v. Bliss*, 11 Ves. 458; *Edelsten v. Edelsten*, 1 De Gex, J. & S. 185; *Hilton v. Woods*, L. R. 4 Eq. 432; *Clarke v. Hart*, 6 H. L. Cas. 633; *Patch v. Ward*, 3 Ch. App. 203; *Caton v. Caton*, L. R. 1 Ch. 149; *Burgh v. Kenny*, 1 Ir. Eq. 264. After a final decree in favor of a party, there must also be an express order or decree for his costs or they are lost: *Stone v. Locke*, 48 Me. 425.

4 *Van Couver v. Bliss*, 11 Ves. 458, 461; and see *Clark v. Reed*, 11 Pick. 449; *Robinson v. Cropsey*, 2 Edw. Ch. 138.

5 *Caldwell v. Leiber*, 7 Paige, 483; *Clark v. Reed*, 11 Pick. 449; *Pinnock v. Clough*, 16 Vt. 500, 42 Am. Dec. 521; *Nicoll v. Huntington*, 1 Johns. Ch. 166; *Johnson v. Taber*, 10 N. Y. 319. If both parties have acted foolishly, or have been equally imprudent, costs are refused: *Hitchcock v. Giddings*, 4 Price, 135.

6 *Pendleton v. Eaton*, 3 Johns. Ch. 69; *Clay v. Richardson*, 2 A. K. Marsh. 199. No costs are allowed to either party where each makes an unfounded claim against the other: *Ten Eyck v. Holmes*, 3 Sand. Ch. 428; *Spencer v. Spencer*, 11 Paige, 299.

7 *McConnell v. McConnell*, 11 Vt. 290. So where the parties settle the subject matter of the suit between themselves out of court, without any arrangement as to the costs, each party pays his own costs: *Den v. Pidcock*, 12 N. J. L. 263; *Bruce v. Gale*, 13 N. J. Eq. 211; *Eastburn v. Kirk*, 2 Johns. Ch. 317.

8 Hoffman v. Skinner, 5 Paige, 526.

9 Swayne v. Lyon, 67 Pa. St. 436; Richmond v. Gray, 3 Allen, 25; Allen v. Atkinson, 21 Mich. 351; Smith v. Turner, 50 Ind. 367; Gans v. Renshaw, 2 Pa. St. 34, 44 Am. Dec. 152.

10 Bloose v. Clanmorris, 3 Bligh, 62. Compare Sherwin v. Shakespeare, 17 Beav. 267; Abbott v. Sworder, 4 De Gex & S. 448; Monro v. Taylor, 8 Hare, 51.

11 Thorp v. Freer, 4 Madd. 466; Aislabie v. Rice, 3 Madd. 256; Cox v. Chamberlain, 4 Ves. 631. Compare Weddall v. Nixon, 17 Beav. 160; Calverley v. Williams, 1 Ves. 210; Fludyer v. Cocker, 12 Ves. 25.

12 Thorp v. Freer, 4 Madd. 466; and see Biscoe v. Wilks, 3 Mer. 456.

13 Hart v. Brand, 1 A. K. Marsh. 162.

14 Dustin v. Newcomer, 8 Ohio, 40; Galloway v. Barr, 12 Ohio, 354; Swartwout v. Burr, 1 Barb. 495; Bruce v. Tilson, 25 N. Y. 194.

15 Winne v. Reynolds, 6 Paige, 407; Scott v. Thorp, 4 Edw. Ch. 1; Wynn v. Morgan, 7 Ves. 202; Newall v. Smith, 1 Jacob & W. 263.

16 Wilson v. Clapham, 1 Jacob & W. 36.

17 Dyer v. Potter, 2 Johns. Ch. 152; and see Sutphen v. Fowler, 9 Paige, 280.

18 See Garey v. Whittingham, 5 Beav. 268; Vansittart v. Vansittart, 4 Kay & J. 62; but see 2 De Gex & J. 258.

19 Hinder v. Streeten, 10 Hare, 18; Purser v. Darby, 4 Kay & J. 44; Cresswell v. Haines, 8 Jur., N. S., 208.

20 Burrowes v. Lock, 10 Ves. 470.

21 Davis v. Symonds, 1 Cox, 402.

22 Wright v. Howard, 1 Sim. & St. 190, 205; McMurray v. Spicer, L. R. 5 Eq. 527.

23 Burnell v. Brown, 1 Jacob & W. 168, 175.

24 Wright v. Howard, 1 Sim. & St. 190, 205; and see West v. Jones, 1 Sim., N. S., 205; Douglass v. Culverwell, 3 Giff. 251; Marshall v. Sladden, 7 Hare, 428, 444; Stainland v. Willott, 3 Macn. & G. 664; New Brunswick etc. Ry. Co. v. Conybeare, 9 H. L. Cas. 711; Griggs v. Staplee, 2 De Gex & S. 572, 590.

### § 405. Bona Fide Purchaser.

The doctrine which protects a bona fide purchaser without notice applies solely to purchasers of a legal title. The purchaser of an equitable interest purchases at his peril, and acquires the property burdened with every prior equity charged upon it.<sup>1</sup> And in order that one may be entitled to protection as a bona fide purchaser, he must have parted with his consideration before notice of a prior conflicting right.<sup>2</sup> And the consideration of the grant must be not only good, but valuable, in the sense that a fair equivalent is given for the property granted.<sup>3</sup> But it has been held that an absolute conveyance of land by a debtor, in payment and satisfaction of a pre-existing debt owing by the grantor to the grantee makes the grantee a bona fide purchaser, as against a prior equity of which he had no notice.<sup>4</sup> The grantee of a bona fide purchaser of real estate takes a good title thereto, although he takes it with full knowledge of an equitable claim thereto existing in another person;<sup>5</sup> but a recognized exception to the rule is, that such a title cannot be conveyed free from the prior equities back to a former owner who was charged with notice.<sup>6</sup> And the fact that one did not participate in a fraud, if he knew that it was being or had been committed, does not entitle him to protection as an innocent purchaser.<sup>7</sup> One is not a purchaser in good faith from or under a corpora-



tion when the deed under which he claims title purports to be made in consideration of the exchange of real for personal property, and the charter of the corporation does not authorize its lands to be conveyed for such a consideration.<sup>8</sup>

1 *York v. McNutt*, 16 Tex. 13, 67 Am. Dec. 607; *Shoufe v. Griffiths*, 4 Wash. 161, 31 Am. St. Rep. 910; *Bruschke v. Wright*, 166 Ill. 183, 57 Am. St. Rep. 125, and note. Bona fide purchaser defined: *Spicer v. Waters*, 65 Barb. 231.

2 *Doran v. Dazey*, 5 N. Dak. 167, 57 Am. St. Rep. 550; *Lynch v. Hancock*, 14 S. C. 90; *Peay v. Seigler*, 48 S. C. 496, 59 Am. St. Rep. 731; *Evans v. Templeton*, 69 Tex. 375, 5 Am. St. Rep. 71.

3 *Ten Eyck v. Witbeck*, 135 N. Y. 40, 31 Am. St. Rep. 809.

4 *McMahan v. Morrison*, 16 Ind. 172, 79 Am. Dec. 418; *Adams v. Vanderbeck*, 148 Ind. 92, 62 Am. St. Rep. 497; and see *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250; *Hanold v. Kays*, 64 Mich. 439, 8 Am. St. Rep. 835. But see contra, *Dickerson v. Tillinghast*, 4 Paige, 215, 25 Am. Dec. 528; *Union Nat. Bank v. Oium*, 3 N. Dak. 193, 44 Am. St. Rep. 533; *Bonner v. Grigsby*, 84 Tex. 330, 31 Am. St. Rep. 48.

5 *Doyle v. Wade*, 23 Fla. 90, 11 Am. St. Rep. 334; *Eldridge v. Post*, 20 Fla. 579; *London v. Youmans*, 31 S. C. 147, 17 Am. St. Rep. 17.

6 *Pomeroy's Equity Jurisprudence*, sec. 754; *Clark v. McNeal*, 114 N. Y. 287, 11 Am. St. Rep. 638; and see *Ely v. Wilcox*, 26 Wis. 91; *Church v. Ruland*, 64 Pa. St. 432.

7 *Lang Syne Gold Min. Co. v. Ross*, 20 Nev. 127, 19 Am. St. Rep. 337; and see *Arnold v. Hagerman*, 45 N. J. Eq. 186, 14 Am. St. Rep. 712.

8 *Franco-Texan Land Co. v. McCormick*, 85 Tex. 416, 34 Am. St. Rep. 815.

**§ 406. Notice of Equities.**

An intending purchaser of land must be deemed to have examined every deed and instrument on record affecting the title, and to have notice of every fact disclosed by the record, and every other fact which an inquiry suggested by the record would have led up to.<sup>1</sup> Whatever puts a purchaser on inquiry is held to be equivalent to notice.<sup>2</sup> Thus, possession of the property by a person other than the vendor is sufficient to put a purchaser on inquiry, and to affect him with knowledge of the claims of the possessor.<sup>3</sup> So a purchaser is chargeable with notice of a vendor's lien existing on the land at the time of his purchase, if he then knew that a part of the purchase price was unpaid. He is put on inquiry by such knowledge as to the existence of the lien.<sup>4</sup> It is held by some courts that a purchaser who accepts a quitclaim deed is not a bona fide purchaser without notice.<sup>5</sup> In some jurisdictions the fact that a purchaser accepts such deed is regarded as a circumstance entitled to consideration in determining whether he is a bona fide purchaser without notice.<sup>6</sup> As a general rule, notice of a lease will affect the purchaser of real estate with notice of the covenants contained in it. And if with knowledge of a lease he buys without examining it, he cannot afterward object that he had no notice of a particular covenant.<sup>7</sup> But an agreement by a landlord giving his ten-

ant an option to purchase, though incorporated in the lease, is no part of it, and is not notice to a third party who agrees to purchase from the landlord.<sup>8</sup> One who sets up the defense of subsequent purchase in good faith, without notice, must affirmatively show a purchase for value, and that the purchase money has been paid before notice.<sup>9</sup> But when a subsequent purchaser proves his purchase and payment for the land, the burden shifts to the party who asserts the equity or encumbrance to show notice thereof to the purchaser.<sup>10</sup> In Illinois, a subsequent purchaser is presumed to be a purchaser for value, and the burden of proof is on the party attacking the conveyance to show bad faith and want of consideration.<sup>11</sup> If two conveyances of the same property are made by the same grantor, and the one last executed be first recorded, it will be presumed that the grantee therein purchased in good faith, for valuable consideration, and without notice of the prior unrecorded conveyance.<sup>12</sup>

1 *Acer v. Westcott*, 46 N. Y. 384, 7 Am. Rep. 355; *McPherson v. Rollins*, 107 N. Y. 316, 1 Am. St. Rep. 826; *Clark v. Holland*, 72 Iowa, 34, 2 Am. St. Rep. 230; *Stewart v. Matheny*, 66 Miss. 21, 14 Am. St. Rep. 538; *Sioux City etc. R. R. Co. v. Singer*, 49 Minn. 301, 32 Am. St. Rep. 554; *Roby v. National Bank*, 4 N. Dak. 156, 50 Am. St. Rep. 633. Compare *Babcock v. Collins*, 60 Minn. 73, 51 Am. St. Rep. 503.

2 See *Knapp v. Bailey*, 79 Me. 195, 1 Am. St. Rep. 295; *Jackson etc. R. R. Co. v. Davison*, 65 Mich. 416; *Murrell v. Mandelbaum*, 85 Tex. 22, 34 Am. St. Rep. 777.

3 *Rorer Iron Co. v. Trout*, 83 Va. 397, 5 Am. St. Rep. 285; *Pleasants v. Blodgett*, 39 Neb. 741, 42 Am. St. Rep. 624; *Ellison v. Torpin*, 44 W. Va. 414; *Kirby v. Tallmadge*, 160 U. S. 379; *Chapman v. Chapman*, 91 Va. 397, 50 Am. St. Rep. 846; and see *Turman v. Bell*, 54 Ark. 273, 26 Am. St. Rep. 35; *May v. Sturdivant*, 75 Iowa, 116, 9 Am. St. Rep. 463.

4 *Woodall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 57; *Foster v. Stallworth*, 62 Ala. 547.

5 See *Pleasants v. Blodgett*, 39 Neb. 741, 42 Am. St. Rep. 624; *Condit v. Maxwell*, 142 Mo. 266; *Baker v. Humphrey*, 101 U. S. 494; sec. 324, ante.

6 *Mansfield v. Dyer*, 131 Mass. 200; *Knapp v. Bailey*, 79 Me. 195, 1 Am. St. Rep. 295; and see *Ellison v. Torpin*, 44 W. Va. 414; *Moelle v. Sherwood*, 148 U. S. 29; *United States v. Land Co.*, 148 U. S. 45.

7 *Wertheimer v. Thomas*, 168 Pa. St. 168, 47 Am. St. Rep. 882.

8 *Wertheimer v. Thomas*, 168 Pa. St. 168, 47 Am. St. Rep. 882. See *Lewis v. Gollner*, 129 N. Y. 227, 26 Am. St. Rep. 516, and note.

9 *Davis v. Ward*, 109 Cal. 186, 50 Am. St. Rep. 29; *Eversdon v. Mayhew*, 65 Cal. 167; *Combination Land Co. v. Morgan*, 95 Cal. 552.

10 *Block etc. Iron Co. v. Iron Co.*, 105 Iowa, 624, 67 Am. St. Rep. 319.

11 *Ryder v. Rush*, 102 Ill. 338; *Anthony v. Wheeler*, 130 Ill. 128, 17 Am. St. Rep. 281.

12 *Parrish v. Mahany*, 10 S. Dak. 276, 66 Am. St. Rep. 715. See *Anthony v. Wheeler*, 130 Ill. 128, 17 Am. St. Rep. 281, note.



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